THE IMPACT OF FEDERAL COMMUNICATIONS COMMISSION PRACTICES ON COMMUNICATION POLICY MAKING 2001-2004: AN INVESTIGATION OF THE POLICY SHIFT FROM PUBLIC SERVICE IDEALISM TO MARKET FORCES PRAGMATISM

by

Beth Caron Fratkin

A dissertation submitted to the faculty of
The University of Utah
in partial fulfillment of the requirements for the degree of

Doctor of Philosophy

Department of Communication

University of Utah

May 2011

The University of Utah Graduate School

STATEMENT OF DISSERTATION APPROVAL

The dissertation of **Beth Caron Fratkin**

has been approved by the following supervisory committee members:

Robert K. Avery	, Chair	**May 6, 2010** Date Approved
Tim Larson	, Member	**May 6, 2010** Date Approved
Nickieann Fleener	, Member	**May 6, 2010** Date Approved
David Vergobbi	, Member	**May 6, 2010** Date Approved
Robert Mayer	, Member	**May 6, 2010** Date Approved

and by **Ann Darling** , Chair of

the Department of **Communication Department**

and by Charles A. Wight, Dean of The Graduate School.

ABSTRACT

This study examines the conflicts, contradictions, and assumptions of policy-makers who tried to reconcile the transformation of U.S. communications policy from a theoretical paradigm that included public service idealism and social aspiration to a regulatory regime that came to be dominated by market forces pragmatism. Although there has never been a universally accepted articulation of broadcasters' obligations to the public that has remained consistent over time, the struggle over this contested terrain came to dominate the controversy over media ownership regulations during Federal Communications Commission (FCC) Chairman Michael Powell's tenure from 2001-2004. Powell's emphasis on economic competition as a means to serve the public interest in broadcasting did not resonate with the interpretive communities whose support was needed to forward his agenda. This study investigates the gulf between Powell's interpretation of the public interest and that of other stakeholders groups in the policy-making process.

The data examined for this project include several types of primary sources: official FCC policy memoranda and orders, statements, research reports, the text of speeches made by FCC commissioners, as well as transcripts of public hearings conducted throughout the period of study. Additional data were gathered from Congressional hearings and testimony, legal documents and decisions, and research reports conducted by public service organizations. Secondary sources were used to provide context. Trade journals, academic

journals, newspapers, other periodicals produced by interested parties are included in this category.

This study grouped policy stakeholders into relatively discrete interpretive communities so that the perspectives of each could be examined. Although the FCC, Congress, the courts, industry groups, and the public have varying degrees of influence over policy decisions, each of these groups had unique perspectives that contributed to policy-making process during the FCC’s Third Biennial Review procedures.

This study finds that despite the comprehensive reappraisal of communications policy that was ushered in after the enactment of the Telecommunication Act of 1996, the focus of the FCC on pragmatic market considerations did not diminish the desire of some stakeholders to perpetuate communications policy that includes a measure of social aspiration and public service.

For Robert K. Avery

my hero, my inspiration, and my friend

TABLE OF CONTENTS

ACKNOWLEDGMENTS

I could not have completed this project if I had not been invited to join a community of scholars who embody the Utah difference. Although I am particularly indebted to the members of my graduate committee, I also owe a debt of gratitude to all of the members of the communication department who contributed to my outstanding graduate school experience.

Thank you Ann Darling for encouraging me to pursue my education, and thank you for encouraging me to aim for excellence. No student could hope for a better role model, and no student could appreciate your support more than I do.

Members of my graduate committee contributed their own considerable scholarly expertise to this project. This dissertation is a far better document than it would have been without the perspective offered by David Vergobbi, Nickieann Fleener, Tim Larson, and Rob Mayer. It is impossible to express the level of appreciation, respect, and gratitude that I hold for my Committee Chair Robert K. Avery. His intellectual curiosity, his unending patience, and his unwavering support made this project possible.

I am also thankful to the Marriner S. Eccles Foundation for providing me with partial financial support for this project.

CHAPTER 1

INTRODUCTION

This study examines the conflicts, contradictions, and assumptions of stakeholders in the policy-making process that tried to reconcile the transformation of U.S. communications policy from a theoretical paradigm that included public service idealism and democratic theory to a regulatory regime that came to be dominated by market forces pragmatism. Both those who study broadcast policy and those who make it have been struggling to define the parameters of the public service obligations of broadcasters since the passage of the Radio Act of 1927 (Barnouw, 1966, 1968, 1970; McChesney, 1993). Even though there has never been a universally accepted articulation of broadcasters' obligations to the public that has remained consistent over time, the assumption that mass communication policy is an essential component of a functioning democracy has persisted (Avery & Stavitsky, 2003; Napoli, 2001a). Even so, the definition of what actually constitutes the public's interest has been undergoing a radical transformation since at least as far back as the Reagan administration (Aufderheide, 1999; Krasnow, Longley, & Terry, 1982; McChesney, 1999, 2004b; Streeter, 1996). As the shift from maintaining a robust marketplace of ideas in broadcasting gave way to the promotion of a competitive economic marketplace, Federal Communications Commission (FCC) policy moved inexorably toward deregulatory policies. By the time that Congress passed the Telecommunications Act of 1996, complete with its provision requiring a biennial review and justification for any remaining regulatory restrictions on broadcast ownership policies, deregulation had become the dominant ideology by the end of the 20st century (Conrad, 1989; Johnson, 1998; Price & Duffy, 1997).

This study is focused on the question of why FCC Chairman Michael Powell failed to enact his deregulatory agenda during his tenure despite enjoying the support of most of the interested stakeholders in the policy-making process (Ahrens, 2005; Labaton, 2005). This project makes an important contribution to our understanding of shifting conceptions of the public service responsibilities of broadcasters during this crucial transition from an analog to digital media environment that is characterized by the appearance of greater consumer choice, technological convergence, and ownership consolidation. Although many scholars have studied the telecommunications policies created by the FCC, there is no comprehensive interpretation of the controversial decisions rendered by this agency during the Powell years.

Background to the Study

When Congress passed the Telecommunications Act of 1996 the intent was to update the regulations that had governed the fastest growing sector of our economy to allow for the growth and diffusion of new technological innovations and to better serve the public in the a new media environment. However, Congress never addressed the contradictions inherent in the regulatory regime, nor did it reconcile those inconsistencies in the Telecommunications Act of 1996, which contained the following clause:

> The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in

the public interest. (Telecommunications Act of 1996, §202(h), pp.111–12)

This small section of a long and complicated bill exacerbated the tension between differing conceptions of what constituted the public interest in broadcasting. When FCC Chairman Powell attempted to further deregulate media ownership as part of the biennial review process in 2003, the agency was inundated by objections to the proposed rules by citizen groups from across the political spectrum. The FCC received approximately 2.5 million letters and comments from citizens and public service organizations with the vast majority opposed to the proposed changes (Fallows, 2003; Hickey, 2003b). Despite the record number of comments filed imploring the FCC to reconsider the redefinition of the public service responsibilities of broadcast companies, Powell held only one public hearing. Shortly thereafter, the FCC passed the new rules by a highly contentious 3-2 vote divided along party lines. Subsequently, Congress passed legislation that allowed for a more moderate relaxation of the number of stations that a media corporation could control nationally (Labaton, 2004).

After the passage of the new rules, a coalition of citizen's groups challenged the new regulations (*Prometheus Radio Project v. FCC*, 2004). Eventually, the Third District Court in Philadelphia remanded the rules back to the FCC, saying that they were arbitrary and capricious. On January 28, 2005, the Justice Department announced that it would not petition the Supreme Court for certiorari to support an appeal for this case (Ahrens, 2005; Labaton, 2005).

Public Interest Theory

The theory that broadcasters have service obligations to the public was first advanced during the radio conferences held in the 1920s, and then again in the Radio Act of 1927 (Benjamin, 1998; Douglas, 1987; Engelman, 1996; McChesney, 1993). This Act established the Federal Radio Commission (FRC) and gave it authority to regulate the growing broadcast industry. The Commission was charged with allocating licenses and protecting the technical integrity of the electromagnetic spectrum. Equally important was the provision that broadcasters were obligated to provide programming that met the "public interest, convenience, or necessity." Congress renewed the authority of the Commission for 1 year in 1928 and then again for the duration of the law. In 1934, Congress passed the Communications Act that permanently established the FCC and kept most of the provisions of the Radio Act largely intact, including the public interest, convenience, or necessity clause. The two acts also placed limits on the number of stations one entity could own in a given location. The theoretical foundation was that diversity of ownership would lead to a more diverse array of programming perspectives that were available to the public. Therefore, the number of outlets any one entity could own was limited.[1] Although the caps were gradually relaxed over the years, media ownership rules represent a classically liberal theory of the First Amendment, in that they were created to encourage competition as a means in which an abundant marketplace of ideas could function within the electromagnetic spectrum (Bunker, 2001; Pember & Calvert, 2008-2009).

[1] In its 2002 Biennial Regulatory Review, the FCC defined five types of diversity; viewpoint, outlet, program, source, and minority and female ownership. In the same document, the FCC described localism as a broadcaster's obligation to be responsive to the needs and interests of local communities. In describing its policy objective of achieving competition, the FCC stated that the Telecommunications Act of 1996 embodied the philosophy that competition is the most effective means of producing the marketplace results that best serve the public interest (FCC, 2003i, p. 19).

Deregulation

By the late 1970s, the media environment, as well as the political environment, began to shift toward deregulatory practices (Krasnow et al., 1982). Instead of focusing on broadcasting and the public interest, regulators began to emphasize the technical aspects of regulation. As satellite, cable, and other new delivery systems became more widespread, the spectrum scarcity doctrine that had provided the rationale for regulation of broadcasting appeared to be an anachronism. When President Reagan came into office in 1980, the administration pushed aggressively for deregulation across many industries. In the appointment of Mark Fowler to the top post at the FCC, Reagan appointed a leader who believed that economic efficiency and competition in the marketplace would best serve the public's interest (Fowler & Brenner, 1982).

In the early 1990s, most Americans were able to access a vast array of media services (Aufderheide, 1999; Meyerson, 1997; Price & Duffy, 1997). Consequently, following the lead of the FCC, legislators reasoned that the structure of the contemporary media environment no longer required a regulatory regime supported by the spectrum scarcity rationale. When Senator Lott introduced the Telecommunications Competition and Deregulation Act in 1995, he said:

> Most telecommunications policy and regulation in America is based upon theNew Deal era Communications Act of 1934. Tight government control over spectrum-based services was justified on a scarcity theory. Neither theory for big government regulation holds true today, if it ever did. (Telecommunications Competition and Deregulations Act, 1995, p. 7881)

By the mid-1990s, it was assumed that the public interest, convenience, or necessity would best be served by allowing a competitive marketplace to dictate the structure of broadcasting. This redefinition of the public interest was partially due to the perceived promise of new technologies. In his speech introducing Senate Bill 652, Senator Pressler said:

> The future of America's economy and society is inextricably linked to the universe of telecommunications and computer technology. Telecommunications and computer technology is a potent force for progress and freedom, more powerful than Gutenberg's invention of the printing press five centuries ago, or Bell's telephone and Marconi's radio in the last century. This force has helped us reach today's historic turning point in America. (Telecommunications Competition and Deregulations Act, 1995, p. 7881)

The following year, Senator Pressler presented a conference report that proposed a compromise to reconcile differences between the House and Senate version of the legislation that would become the Telecommunications Act of 1996.

> Competition, not regulation, is the best way to spur innovation and the development of new services. A competitive marketplace is the most efficient way to lower prices and increase value for consumers. More competitive American telecommunications markets will promote United States technological advances, domestic job and investment opportunities, national competitiveness, sustained economic development, and improved quality of American life more effectively than regulation. (S. Rpt. No. 686, 1996, p. 42)

The 1996 rewrite of the Communications Act of 1934 was designed to create a regulatory environment that would knock down the old barriers between the different sectors of telecommunications (Aufderheide, 1999; Meyerson, 1997). Traditional regulatory definitions of mass media, computing, and telephony were seen as artificial restraints that were no longer relevant. Therefore, it was reasoned that the public interest would be served by meeting the needs of consumers who would benefit from the availability of new, inexpensive, information delivery systems. When the Telecommunications Act finally passed, it contained provisions that further loosened the already eroding media ownership restrictions that had been in place.

While President Clinton's administration supported the passage of the act, there was increasing concern over the issue of media consolidation during the later years of Clinton's presidency (Napoli, 2001a; Smith, 2003). Clinton appointed FCC Chairman William Kennard supported the few existing limits on ownership, created incentives to encourage diversity of ownership by minority broadcasters, and attempted to create a new low-power noncommercial radio service designed to promote community broadcasting (Stavitsky, Avery, & Vanhala, 2001). Although Kennard's agenda to encourage public service broadcasting through innovation of services was supported by many members of the public from across the political spectrum, Congress did not support his efforts. Subsequently, under pressure from Congress, in 1999 the FCC voted to allow duopolies under limited conditions and voted to further relax limits on cross-ownership of television and radio stations (Cooper, 2003; McChesney, 2004b).

Broadcasters argued that the media ownership rules were arbitrary and capricious and were an impediment to doing business in an era of dwindling viewership for broadcast television. Fox Broadcasting Company contended that the caps provided by the National Television Station Ownership Rule (35%) and the Cable/Broadcasting Cross-Ownership Rule were invalid (*Fox v. FCC*, 2002). The District of Columbia Court of Appeals struck down the FCC's ban on cross-ownership but said that a national ownership cap was constitutional in general. However, the court also ordered the FCC to show why the cap of 35 % was not arbitrary and capricious. In other words, the Court ordered the FCC to provide empirical evidence to support its claim that the existing ownership rules did in fact preserve diversity and the public's interest (Cooper, 2003; McChesney, 2004b).

Genesis and Justification of the Problem

Clearly, public dissatisfaction with the content, form, and function of broadcast media is nothing new. However, given the number of objections to policy changes that have an enormous impact on the nature of how and where Americans receive information, the public outcry denouncing increased media consolidation is especially important. The years between 2001-2005, the years of Powell's tenure as Chairman of the FCC, represent a period of significant public backlash against policies favoring deregulation of the telecommunications industry as a whole.

When President Bush appointed Michael Powell to head the Commission in 2001, one of the first things he did after taking the helm was to commission 12 research studies designed to provide empirical data to address the very issues that were before the courts (Huntemann, 2004; Smith, 2003). The White House clearly supported a deregulatory agenda, as did Powell.

When the court issued its opinion in *Fox v. FCC*, Powell saw it as the perfect opportunity to relax ownership rules (Smith, 2003). He was quoted as saying on many occasions that the court had ordered the FCC to reexamine the rules based on the Telecommunications Act provision for biennial reviews (Hickey, 2003a). The FCC solicited public comments on the issue, and the public responded in droves. The FCC received more public comments from individuals and public interest groups across the political spectrum than it had received about any other matter in the entire history of broadcast regulation. Despite evidence that the vast majority of the comments the FCC received were opposed to any relaxation of media ownership restrictions, Powell held only one public hearing on the issue in Richmond, Virginia.

As Hickey (2003a) reported in the *Columbia Journalism Review*, “Soon, groups who had been only peripherally involved in the loose coalition became increasingly angered by Powell's intransigence” (Hickey, p. 26). The two Democratic Commissioners at the FCC, Copps and Adelstein, were also outraged (Labaton, 2005). In fact, the Commissioners were so opposed to Powell’s position that they held a series of unofficial public hearings across the country. Record crowds turned up at all of these hearings, and the overwhelming consensus was opposed to further consolidation in the broadcast industry. On June 2, 2003, the Commission ignored the public outcry and voted along party lines to relax ownership restrictions across the board. Several weeks later, the Senate responded to public pressure with a compromise bill limiting the national ownership cap to 39%, down from the 45% cap that was passed by the FCC. In April 2004, the Philadelphia District Court remanded the new rules back to the FCC saying that the data commissioned by the FCC were grossly flawed and were therefore arbitrary and capricious. Powell was widely criticized for his actions on the matter, and for months there were rumors of his departure. The White House backed off of its support of Powell, and finally, in January of 2005, Powell announced that President Bush had accepted his resignation (Powell, 2005).

Statement of the Problem

The purpose of this study is fourfold. The objectives are (a) to situate the communications policy environment from 2001-2004 against the historical background of broadcast regulation in the face of growing media consolidation, (b) to analyze the specific policy implementation practices of the FCC during the 4-year period under consideration, (c) to analyze the arguments of citizen groups opposed to the communications policies enacted by the FCC, and (d) to compare and contrast the public interest arguments generated by the FCC and citizens groups in order to provide a critical analysis of FCC performance, 2001-2004. The research questions derived from this statement of the problem are as follows:

1. How did the competing public interest definitions advanced by FCC Commissioners contribute to the formulation of broadcast ownership policy procedures and practices during this period?

2. How did the Telecommunications Act of 1996 reframe the communications environment?

3. To what extent did the competing interpretations extant during this time period contribute to the specific procedures for generating public response to proposed rulemaking?

4. To what extent did the range of public comments contribute to subsequent policy-making during these years?

5. What are the competing values embodied in the FCC's rulemaking, the public response to that policy decision, and in the Court's response to those decisions in *Prometheus Radio Project v. FCC*?

Survey of the Literature

Although this study was focused primarily on the time period of Chairman Powell's tenure at the helm of the FCC, it is necessary to understand the historical evolution of broadcast regulation in order to interpret how the definition of public service broadcasting has evolved. Many historical works were consulted during the process of conducting this study. Horowitz (1989) traces the origins of the public interest in broadcasting to the early 19th century when the nation was developing government-sponsored infrastructure projects. States and municipalities entered into public-private partnerships and began to grant charters of incorporation to private developers if they worked on projects that were "affected with a public interest." During this era, corporations were granted access to public resources if they were perceived to provide a communal service. As the century progressed, the classic liberal legal paradigm that governed our early history expanded to include a corporativst perspective.

However, as the telegraph developed in midcentury, there were those who felt that the structure of the communications infrastructure should be a public resource. The theory that the telegraph could provide a service that was in the public interest was endorsed by Samuel Morse himself. Yet, Czitrom (1982) describes the tension between regulators who envisioned the utopian possibilities of the new technology and the tension between the more pragmatic concerns of politicians and corporations who understood the economic and ideological power the telegraph represented. Additionally, Czitrom’s discussion of the challenges and opportunities presented by the telegraph is particularly insightful as it demonstrates how the potential for advancing a more participatory democracy through the use of technology was seen as a lost opportunity after Western Union gained its monopoly over the industry.

Since most serious broadcast policy analysts agree that the concept of public interest broadcasting is closely related to theories of self-government, democracy, and freedom of the press, it is reasonable to assume that early policy-makers were influenced by theorists such as Zachariah Chaffee, who wrote passionately about the social interest contained in the First Amendment. In 1919, the same year that Oliver Wendell Holmes made his famous declaration that the truth should be able to compete in a robust marketplace of ideas, Chaffee (1919) discussed the importance of maintaining “a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action, but carry it out in the wisest way” (p. 985). Thirty years later

Meiklejohn (1948) discussed his theory of free speech and wrote, “the unabridged freedom of public discussion is the rock on which this government stands” (p. 86). While Dewey (1991) was not a legal theorist, his discussions of community and broadcasting surely influenced the intellectuals of his day. Contemporary First Amendment scholars such as Sunstein (1995), Bollinger (1986), and Bunker (2001) have also written about how the social intent of the First Amendment can be used to inform public interest policy decisions in the media.

As wireless telegraphy and radio appeared on the scene, legislators struggled over how to structure the nascent broadcasting industry. Sterling and Kittross (1990), Barnouw (1966), and McChesney (1993) argue that after World War I there was a growing sense that regulators had made a mistake when they allowed the telegraph to become a strictly commercial and mostly unregulated service. Douglas’ (1987) history of the years between Marconi’s first demonstrations of wireless telegraphy until the radio conferences of the 1920s explains how an estimated 250,000 amateur radio operators advanced the argument that a diversity of voices in broadcasting defined, at least in part, the public interest. As Engelman (1996) also demonstrates in his history of public radio and television in America, many educators argued that national resources such as the public airwaves should be employed in service to the public. Educators, particularly those from the large land-grant universities, sought to extend their educational missions to the electronic spectrum and created distance-learning opportunities for the public.

McChesney’s (1993) history of the broadcast reform movement, 1927-1935, demonstrates that there was a highly contested struggle during those years regarding who would get to define the public interest in broadcasting. The majority of Congress rationalized that a commercial system of broadcasting was preferable to one dominated by noncommercial broadcasters because corporations had more resources and therefore could develop a national service. However, a substantial minority of Congress and the general public favored a system that would provide for a diversity of voices, viewpoints, and owners across the spectrum.

Streeter's (1996) critical theory of corporate liberalism is perhaps the most encompassing explanation for how the regulatory structure that was developed early in the last century came into being. Inevitably, the contemporary structure of broadcasting evolved to become a system dominated by fewer and fewer multinational corporations. According to Streeter, broadcasting could not have developed any other way because the principles of corporate liberalism that were established at the beginning of the 19^{th} century were already firmly established before radio appeared on the scene. Streeter argues that predominant American values such as faith in professional expertise, functionalism, and faith in technology as an instrument for achieving social goals, made it predictable that corporations would end up "owning" the airwaves. There was simply no way that regulators could trust amateurs, teachers, or hobbyists to preserve or promote the public interest. Streeter, McChesney (1993), and Blakely (1979) make a convincing case that an overriding belief in the infallibility of corporate liberalism resulted in a lack of critical assessment of the failures of capitalism. The public interest in broadcasting was not the highest priority for regulators.

Baughman (1981) and Armstrong (2002) examined the policy failures of the FCC during the period after World War II when utopian hopes for television were soaring. Baughman's thesis is that since the FCC was never an independent regulatory agency but was in fact dependent on Congressional and Presidential support for its power to regulate, it was precluded from preventing television from becoming a "vast wasteland." Therefore, when the agency attempted to enforce public interest standards, it never had enough power on its own to face off against competing commercial and political interests. This perspective conforms to Howowitz's (1989) theory of regulatory capture. Armstrong's study of localism, how it was defined, enforced, and extended, illustrates how ambivalent the agency itself was over the definition of public service broadcasting. The assumption that the public would somehow be served well if there were live, local programming, produced by broadcasters with roots in the communities they served, was given much lip service. However, due to the FCC's vacillating policy statements and sporadic attempts to enforce the standards they could define, the competing values of media corporations won out over even the most broad interpretations of public interest broadcasting.

As the hopes that many had for a television service that could create a public forum for the exchange of ideas seemed to fade, educators stepped up to the plate and lobbied for a noncommercial service that could offer an alternative (Witherspoon, Kovitz, Avery, & Stavitsky, 2000). After the Public Broadcasting Act of 1967 passed, Avery and Pepper (1974) documented the problems and concerns raised by creating an institution that was never fully funded and never fully insulated from the vagaries of political trends. Many other scholars have continued to criticize the policies that resulted in a grand experiment that was to produce and define public interest programming on a public broadcasting network, one that has never been fully realized (Brown, 1971; Day, 1995; Engelman, 1995; Hoynes, 1994; Ledbetter, 1997b; Stavitsky, 1995).

When Bagdikian first published his seminal work on media monopolies in 1983, he raised the issue of whether media consolidation was harmful to democracy. Other critical scholars have since advanced his work (see, for example, Chester, 2005; Cooper, 2005; Klinenberg, 2007; McChesney, 1999, 2004a, 2004b). Aufderheide's (1999) analysis of the Telecommunications Act of 1996 looks at the long-reaching economic, political, technological, and public service ramifications of the act. Her assertion that legislators retained the public service components of broadcast regulation, even while they redefined its very meaning, is particularly instructive. Meyerson (1997) and Price and Duffy (1997) suggest that despite all of the deregulatory rhetoric espoused by Congress during the process that led to the passage of the Telecommunications Act, many of the same regulatory divisions that existed prior to the act were retained. Consequently, a less competitive marketplace exists in many discrete segments of telecommunications regulation. Thus, despite regulatory reliance on competition as a means to meet the public interest in broadcasting, increased consolidation in media spurred on by deregulatory practice has decreased public service.

Other articles published in academic and law journals show that deregulation, in one form or another, has weakened specific measures designed to meet the public interest in broadcasting (Chang & Ki, 2004; Petros, 1999; Singleton, 2003). Convention papers and journal articles that discuss the specific problem of media cross-ownership policy during Powell's tenure include the quantitative work of Huntemann (2004), Smith's (2003) analysis of studies conducted by the FCC, Cooper's (2003) critique of those same studies, and the working papers of the FCC itself (see, for example, Bush 2002).

This category of literature also includes essays published in law journals that either attempt to either support or refute the FCC’s legal and technical arguments for deregulating broadcasting. Singleton’s (2003) article in *Communication Law and Policy* is representative in that he argues that when the FCC liberalized radio-television duopoly restrictions in the 50 largest media markets in 1999 it resulted in fewer regularly scheduled local news or public affairs programs in those markets. Consequently, Singleton (2003) asserts that the FCC is violating its own rules. Another article written by Chester (2004), director of the Center for Media Education, accuses Chairman Powell of being biased in favor of a market-oriented approach to media regulation and favoring the First Amendment rights of broadcasters over those of the public. Pritchard (2001) examines the legal definition of diverse and antagonistic sources and the effects of reducing them on local newspaper/broadcast cross-ownership policies.

Many of the studies are quantitative studies that interrogate the statistical analysis that led the FCC to conclude that the public interest would best be served by deregulating broadcast ownership restrictions. For example, Lin (2004) published his report that argues that “the idea of dual concept and Simpson's D, as a statistical method, are superior to other techniques designed to measure economic diversity” and would therefore be a better model for the FCC to use than the methods they are currently using (p.1). *Journalism & Mass Communication Quarterly* published a study by Petros (1999) that purports to show that the range of opinions to which the consumer-citizen has access is being limited by broadcasting media market structures on both sides of the Atlantic. Hakanen (2002) published a report of a study he conducted in the *Journal of Communication Inquiry* that measured programming in three selected media markets in

1976, 1985, and in 1997, that demonstrates that public affairs programming and other forms of local production have declined since 1976. Another example of scholarship in this category includes Chambers' (2003) analysis of the structural changes in small media markets that were a result of the relaxation of ownership restrictions in radio regulations after the passage of the Telecommunications Act of 1996.

A final category of literature consulted for this study includes literature generated by the FCC and reports contained in the popular and trade press and newspapers. These materials provide a record of the day-to-day developments that motivated the public, the FCC, and Congress to come to the decisions that they did during this crucial period of transition. For example, there have been numerous articles that have appeared in the *New York Times* and the *Washington Post* (see, for example, Ahrens, 2005; Labaton, 2005). Several magazine articles that were particularly instructive include the histories of the controversies during Powell's tenure written by Fallows (2003) in the *Atlantic Monthly* and by Hinckley (2003a, 2003b) in the *Columbia Journalism Review*, and an article that appeared in the *Economist* ("The politics," 2003). Many articles like the one written by Trigoboff (2003) for *Broadcasting and Cable* were also reviewed.

Methodology

This study is a critical examination of historical and contemporary discourse surrounding media ownership regulations during a specific time period when the public became engaged in the process of constructing and deconstructing communications policy. It is critical in the sense that it investigates, interprets, and reinterprets the contexts in which these events transpired, and it is critical in the sense that this study examines the points when the knowledge structures of various interpretive communities intersect and diverge. Further, this study critically interprets the conclusions reached by stakeholders in the policy-making process.

If "the law is a set of lived social relations" as critical legal theorists suggest, then law and policy are always open to interpretation and are therefore contingent on the changing conditions of hegemonic and counterhegemonic forces in society (Streeter, 1996, p. 15). In other words, law and policy, like the culture they are situated within, are never static, and therefore the interpretation and application of law and policy are always in a state of transformation dependent on shifting values and definitions. If the meaning of any regulation derives from its interpretation, the social relations that constitute individuals within a given interpretive community constrain and limit the ways in which a regulation can be criticized. Fish (1980) first coined the term "interpretive communities" to describe

> not so much a group of individuals who shared a point of view, but a point of view or way of organizing experience that shared individuals in a sense that that its assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance were the content of the consciousness of community members who were therefore no longer individuals, but insofar as they were embedded in the community's enterprise, community property. (Fish, 1989, p.141)

Interpretive communities that share common assumptions about the nature of meaning will therefore tend to share common interpretive strategies. Members are inescapably bound by "the modes of thought made available by interpretive communities" (Bunker, 2001, p. 70). Zelizer (1993) applied this concept as an alternative way of conceptualizing the shared values of journalists, and posited that the construction of knowledge within interpretative communities implies certain patterns of authority, communication, and memory. According to Zelizer (1993), interpretive communities arise less from formal frames of professions than from informal associations that are built around shared interpretations. At its core, this dissertation is a study of how separate, yet overlapping, interpretive communities struggled to define the meaning of the public interest with regard to media ownership policies. In the case of this study, the stakeholders in the policy-making process assume the characteristics of interpretive communities.

Krasnow et al. (1982) named the FCC, Congress, the broadcast industry, the public, the courts, and the White House as the six major groups that drive the direction of policy decisions. Their argument was that in order to understand how the process works, one has to be able to understand how the groups interact with each other. Therefore, one must look at the policy-making process as a permeable system with six major actors who are constantly responding to outside pressures, internal interpretations, and historical precedent. Since conditions outside of the system are always in a state of flux, the six groups are always responding, reinterpreting, and reacting to changing contingencies. In other words, the regulatory process is one that is essentially an act of communication (Brahman, 2003). As such, Carey's proposition that "communication is a symbolic process whereby reality is produced, maintained, repaired, and transformed" applies to the policy-making process as well (Carey, 1988, p.23). Consequently, this study starts with the six stakeholders named by Krasnow et al. and identifies outside influences on the system as well as internal interactions from within the system.

Napoli's (2001a) study assumed a similar approach. He began with the stakeholder groups identified by Krasnow et al. (1982) and expanded his analysis to include seven core values that are associated with communications policy. There are (a) the First Amendment, (b) the public interest, (c) the marketplace of ideas, (d) diversity, (e) competition, (f) universal service, and (g) localism. According to Napoli,

> …communications policy decisions are a product of a potential process in which multiple interested stakeholders, each with potentially conflicting interests and different influence tools available to them, attempt to affect policy outcomes. In some instances, they are primarily economic, in others, they are primarily political, wherein in others they are motivated by a combination of factors. (p. 226)

Napoli (2001a) argues that the literature is full of studies that have sought to evaluate broadcasting policy based on economic models. Although he acknowledges that economic criteria and principles are vital components of communications policy analysis, these quantifiable studies, on their own, do not provide a comprehensive understanding of the social values that are equally important to consider in broadcasting policy. This dissertation contributes to our understanding of the conflict between regulators' perceptions of the public interest in broadcasting and the public's perceptions of what the public interest entails, precisely since it takes into account those social values that cannot be counted. In a very real sense, this particular public policy controversy, one that is ostensibly a contestation over the validity of relaxing media ownership restrictions, is, at a more basic level, a contest over conflicting social values that simply cannot be quantified. Napoli's model of the foundation principles of broadcast regulation is a systematic approach to analyzing the social values contained in the definition of the public interest in broadcasting. Napoli argues that unless one understands how much of a role each of these values or principles plays in specific policy decisions, any analysis of those discussions will only be superficial.

All scholars must have an interpretive framework. This study adapts and extends Sillars' (1991) model of value analysis to the model developed by Napoli (2001a). Value analysis is a form of textual analysis that allows a researcher to identify common and conflicting values (Armstrong, 2002; Sillars, 1991). In this case, value analysis helps identify the common and conflicting values that define issues that the six major stakeholder groups must agree on in order to create successful public policy that will benefit citizens and allow the companies that serve them to remain profitable.

Sillars' (1991) approach begins with the assumption that all texts contain both explicit and implicit expressions of the values of the individual or organization that produced it. Accordingly, within any given text, it is possible to identify a system of values. Sillars and Gronbeck (2001) recommend a systematic approach to value analysis, one that has been used successfully by researchers such as Avery and Stavitsky (2003) in their critique of telecommunications policy-making, by Conduit and Lucaities (1993) who studied the changing definitions of equality over several historical periods, and by Armstrong (2002) who used value analysis to deconstruct the concept of localism in broadcast policy.

Whether discussing legal value systems or FCC regulatory principles, it is important to acknowledge that the researcher must interpret texts and discourse. Streeter (1987) speaks extensively of a discourse of technology that influenced regulators to radically revise their approach to cable television. He explains that the discourse of technology created “a terrain for collective action while simultaneously obscuring underlying conflicts…” (p.174). The discourse of technology can be summarized as that familiar song that posits that new technologies will enable us to achieve a utopian, democratic communication environment once and for all. This continuing refrain allows constituents from very different perspectives to be united by the supposed promise of new technologies that exist in the present and in the future. This has certainly been the case with the discourse surrounding media ownership policies. While different interest groups or interpretive communities may not always agree on many aspects of a new policy proposal, they will, according to Streeter (1987), compromise accordingly if they are sufficiently enamored of the new technology under discussion. While Streeter was using the phrase *discourse of technology*, to refer to the development of the cable television industry during the 1970s, this conception is equally relevant to subsequent discussions of the discourse(s) of broadcast deregulation, especially in regard to the Telecommunications Act of 1996. Powell's reliance on the discourse of technology simply failed, finally, to unite the stakeholders in the debate over the public interest in broadcasting.

To summarize, this study is a critical examination of the texts produced by the relevant stakeholders in the contest to define the parameters of the public's interest in broadcasting. This study is also a textual analysis of the values that are part of the regulatory structure of broadcasting.

Evidence and Procedures

This study focused on the examination of broad categories of primary documents. Many of these data came from FCC policy statements, memoranda and orders, press releases, studies, transcripts of speeches given by the commissioners, and roundtable discussions that were conducted by the agency and accessed via the FCC's website. Data from the *Congressional Record* and other legislative evidence were obtained from LexisNexis. This same database was used to access court decisions and other legal materials. Another category of primary sources came from the websites of public interest and media advocacy groups. Transcripts of unofficial public hearings conducted by Commissioners Adelstein and Copps were obtained from those sources. Historic and analytic treatises by scholars working in the realm of economics, cultural studies, political science, sociology, and policy studies were consulted for this study. Additionally, this investigation made use of many secondary sources published in trade journals, newspapers, and magazines. These sources often provided the only daily record of political discourse about media ownership during this time period.

Organization of the Dissertation

The findings of this study are presented in a chronological narrative that begins within the 19th century when the first federal regulations were established and ends with a discussion of *Prometheus Radio Project v. FCC* in 2004.

Chapter 2 traces the development of the national transportation infrastructure and compares it to the development of the communications infrastructure. This chapter explains how the broadcasting industry was structured by stakeholders in the process and how key decisions were influenced by outside forces. An overview of the history of media regulations is provided here until the 1980s, when deregulatory practices began to appear on the agenda of many federal agencies.

Chapter 3 includes an analysis of the issues that led to passage of the Telecommunications Act of 1996. Next, this section examines the regulatory climate after the restructuring of the regulatory regime that had been in place since the FCC was established. It discusses the outcome of the first biennial review conducted by the FCC in 1998, complete with the documentation of the conflicting perspectives of individual commissioners, industry observers, and other interested stakeholders.

Chapter 4 describes how momentum for the further deregulation of media ownership policies gained traction during Powell's tenure. This chapter describes how the perspectives of each commissioner influenced the policy-making process and how Congress, industry representatives, public interest activists, and academics helped shape the discourse about media ownership policies.

Chapter 5 focuses on public interest groups and media activists. It documents the beginning of a movement opposing deregulatory practices. It provides the background for understanding the dissatisfaction of those who opposed further relaxation of media ownership policies.

Chapter 6 analyzes the issues and decisions rendered by the court in the *Sinclair v. FCC* and *Fox v. FCC* decisions that resulted from the agency's decisions on the biennial reviews. It examines the regulatory problems that arose from these decisions and Powell's assertion that the Court was forcing the FCC to abolish its media ownership policies. This chapter dissects Powell's reasoning and offers an alternative perspective

Chapter 7 evaluates 12 studies commissioned by the FCC to provide empirical evidence to support the agency's rulings in court. The evidence demonstrates that in many cases, researchers used flawed methodology and reached unsupported conclusions.

Chapter 8 considers the growing opposition to the policy direction taken by the FCC. It identifies the issues under dispute, and it analyzes the dissenting opinions of stakeholders in the process.

Chapter 9 examines the comments of citizens and other stakeholders who showed up at public hearings to express their points of view on the issue.

Chapter 10 discusses opposition to the FCC's proposed policy changes. Here, criticisms of the proposed changes are examined and Powell's position is challenged. This chapter examines the decision.

Chapter 11 studies the reaction to the rule changes, and the events that led to the court challenge to the new regulations. The decision of the court in *Prometheus Radio Project v. FCC* is analyzed and compared to the FCC's Report and Order.

Chapter 12 summarizes and evaluates the empirical findings of the project. It answers the research questions posed at the beginning of this study and provides recommendations for future research. This section discusses the implications of this study for future policy decisions.

CHAPTER 2

THE HISTORICAL CONTEXT FOR MEDIA REGULATIONS

Americans often speak of their style of democracy as if it were a collectively agreed on set of objective assumptions about how the government should be run and what it means for us as individual citizens (Sillars & Gronbeck, 2001). Although there are certain core beliefs have persisted throughout the course of our country's history, those values, and how they are defined, have always been subjective and contested. While the U.S. Constitution, a quintessential expression of classical liberalism, created the architecture for government and expressed a loosely stated set of principles that Americans still embrace, it did not create a blueprint for solving the problems of governance in the 21st century.

This chapter demonstrates how classical liberal thought and the theory of democracy adapted to accommodate an industrial economy that produced large shifts in population patterns and technological development that would have been unthinkable at the beginning of the 1800s (Bruchey, 1968; Dale, 2004; Schlesinger, 1951; Wiebe, 1967). This chapter also provides evidence to support the proposition that by the time the issue of regulating broadcasting was raised, statutory law and the economic order created to regulate commerce had already served to establish the foundation for the structure of broadcasting (McChesney, 1993; Streeter, 1996). During the period that classical liberal thought was expanding, revising, and reinterpreting its principle tenets, remnants of an older paradigm remained and influenced the legislature that created the Federal Radio Commission (Hawley, 1974; Horowitz, 1989). The paradox embodied in the first attempts to regulate commerce led to a Janus-like approach to the regulation of broadcasting that surfaced during the controversy over media ownership in 2003. This chapter will trace the discursive threads that evolved during the 19th and 20th century that led to public and interagency discussions that attempted to define what exactly constituted the public interest in the 21st century. Finally, this chapter discusses the emergence of interest groups that developed explanatory strategies that became the foundation for the formation of interpretive communities that participated in the debate over media ownership during the next century.

Shifting Paradigms

At the turn of the 19th century, most American's were united by an agrarian life-style that was supported by a classical liberal orientation that structured and organized legal thought, political habits, and the organization of society (Horowitz, 1989; Tedlow, 1985). Regardless of how one feels about overarching theories and general statements, certain ways of perceiving the world, and one's place in the world, guide the way society is imagined and structured (Fish, 1980; Hall, 1993; Streeter, 1996; Williams, 1998). Individuals and organizations share values and ways of constructing the world that influence the development of institutions and belief systems. For the majority of the 19th century, the assumption that there was a natural right to own private property, that liberty was perceived as an absence of restraints against individuals, and that individuals were rational and acted on their own self-interest, prevailed as the dominant organizing principles for society (Lustig, 1982; Wetlaufer, 1999). These classical liberal values were celebrated in the Constitution. Although the contradictions inherent in elevating individual rights over the rights of a collective society were never resolved, most people believed these assumptions were self-evident.

The natural right of an individual to own private property also coincided with the belief that entrepreneurship in the free market should be highly lauded (Horowitz, 1989; Lustig, 1982; Wetlaufer, 1999). People subscribed to the notion that a clever individual producing a superior product in a competitive market would always succeed in the marketplace. The classical liberal free market was, if nothing else, a so-called rational belief that American ingenuity would always be rewarded.

The Age of Reason also brought forth assumptions about progress (Postman, 1999). The almost religious faith in science as a means to achieve a not-so-distant future where the ills of humanity would be cured through innovation and inventiveness, was also characteristic of the era that produced these habits of thought (Czitrom, 1982; Horowitz, 1989). This consciousness was discernible in the jurisprudence of the legal formalists who assumed that the task of a jurist was to merely apply found law, or natural law, to conflicts between parties rationally and objectively (Wetlaufer, 1999). Accordingly, there emerged the belief that the law should be above political concerns as politics is by nature subjective, whereas the rules of law are governed by the proposition that its purpose is to mediate or transcend the vagaries of men.

In the early years of the 19th century, as the migration westward progressed and the economy began to expand, municipalities and states began to grant charters of incorporation to quasi-public organizations that pledged to build roads, expand water projects, and develop public resources (Bruchey, 1968; Colten, 1995). In exchange, these quasi-public corporations enjoyed many privileges that unincorporated businesses did not. The corporations were granted the right to raise capital through the sale of stock, were granted monopolies to right of ways for their projects, and were granted the right of eminent domain. Additionally, these corporations were granted tax exemptions and the right to engage in banking operations.

When states began to grant charters of incorporation to private entities in order to facilitate the growth of the nation's infrastructure, they sanctioned the development of monopolies in industries that were "affected with a public interest," a legal principle that preceded the concept of common carriers (Colten, 1995; Horowitz, 1989; *Munn v. Illinois*, 1876). As other commercial interests across many sectors of the economy demanded the right to incorporate, they created a business environment that gave rise to the growth of large centralized corporations whether they were affected with a public interest or not. After the Civil War, industrial corporations emerged that controlled production and distribution channels, thus giving them enormous power over the development of public and private resources (Schlesinger, 1951; Tedlow, 1985; Wiebe, 1967).

During this same period, jurists from the legal formalist school were expanding the rights of private property owners and extending those rights to corporations (Monsma, 2006; Wetlaufer, 1999). The dilemma for the legal formalists was how to reconcile the paramount rights of an individual, in an era when citizens were becoming increasingly dependent on corporations for their livelihood and well-being. Since the formalists professed the belief that individual liberty and autonomy were vital to the foundational principles of the law, they had no choice but to expand the legal definition of an individual to encompass the rights of *individual* corporations. In essence, the corporation, and the rights ascribed to it, became analogous to the rights of an individual.

The Railroads

As with the FCC during the New Deal era, the first federal regulatory agency arose to bring order to an industry dominated by chaos, and like the FCC, the Interstate Commerce Commission (ICC) developed as a result of pleas for regulation by the industry itself (Chandler, 1968; Horowitz, 1989). By midcentury, the contradictory assumptions that obscured many of the dominant features of classical liberalism were beginning to emerge. The growth of the railroad industry brought many of these problems to the surface. The idea that a competitive marketplace could produce an economically efficient environment that would benefit entrepreneurs, producers, citizens, and manufacturers was looked at with increasing suspicion (Schlesinger, 1951; Tedlow, 1985; Wiebe, 1967; Zinn, 1985). The railroad industry was an excellent example of the malfunctions that occurred in an unrestricted free market.

In its early stages, small, undercapitalized companies dominated the railroad industry and there was fierce competition among the players (Chandler, 1968; Horowitz, 1989; Schlesinger, 1951; Tedlow, 1985). There were duplications of service on the most profitable lines and nonexistent service in rural areas. Since the fixed costs of operation were so high, there was enormous pressure on individual lines to increase traffic. As the industry expanded westward, the railroads entered into pool agreements and cartels to try to offset the costs of expansion. However, these agreements were unenforceable and sometimes illegal, and many lines provided secret rebates to favored customers. There was also the problem of individual owners not honoring the limits of the pool arrangement, lines that classified freight illegally, and lines that neglected to contribute their share to the pools at all. Clearly, the free market could not accommodate the problems of developing this critical component of the nation's infrastructure unless the legal precedents and concomitant values of classical liberalism could be modified to adjust to the pragmatic limitations of capital-intensive industries.

Despite and because of these problems, the railroads had enormous power (Schlesinger, 1951). A town that was not served by the railroads was essentially doomed to oblivion. Since the industry was so ruthlessly competitive, it was common practice to give much more favorable rates to the largest customers who needed to haul their freight over the longest distances. Farmers and small producers who wanted to ship their goods over shorter routes paid the highest rates and were sometimes frozen out altogether. The Granger Laws, passed in the 1870s, were enacted as a result of discriminatory rate structures in the Midwest. These laws attempted to impose state regulations on the railroads to eliminate these disparities.

The railroads argued that the Granger Laws interfered with interstate commerce, and since they were private corporations, the courts could not interfere with their right to conduct business (*Munn v. Illinois*, 1876). The majority opinion in *Munn* rejected those arguments and found a legal rationale for state regulation in the common law doctrine of "affectation with a public interest," the rationale that was used to allow businesses to incorporate earlier in the century. If a business was providing a service that was essential to the public, that enterprise was entitled to certain privileges by virtue of its function, provided the business offered equal access to its services. Over time, the Supreme Court also found an expanded rationale for affirmative regulation of industry in the public interest in the Commerce Clause of the Constitution (Horowitz, 1989; Wetlaufer, 1999). However, this decision required a major discursive turn to reconcile the classical liberal principle that granted autonomy to individuals or, in this case corporations, and required the law to modify the definition of the free market. There were other reasons that the *Munn* decision was important. First, the decision provided the trajectory that resulted in the first federal regulation of commerce (Chandler, 1968; Tedlow, 1985). Second, the decision formed the basis for regulating common carriers and provided the basis for the authority to regulate in favor of the public interest. While the public interest has been defined legally in many ways across numerous different regulatory agencies since then, the common usage of the term is what lies beneath much of the ideology that supports the authority to regulate commerce, particularly in the case of broadcast regulations. However, by elevating the rights of corporations that presumably provided a valuable communal service, the individual right to autonomy that had previously been one of the bedrocks on which American jurisprudence rested had to be modified to reflect a new hierarchy of values.

Nine years after the courts decided that railroads were common carriers, the Supreme Court abolished the state's right to regulate railroads on the basis that those regulations were interfering with interstate commerce (*Wabash, St. Louis and Pacific Railway Company v. Illinois*, 1886). The higher courts had been gradually expanding the power of the federal government to supersede state rights, and the *Wabash* decision reflected this trend (Horowitz, 1989). The decision created the legal authority for federal regulation of interstate commerce. After *Wabash*, there was a nearly unanimous consensus that Congress needed to step in to rectify the problems in the railroad industry.

By this point, the railroad market could at best be characterized as an oligarchy, and the premise that the free market required unrestrained competition to promote an equitable economic environment was less important than serving the public's interest in equitable rate structures and access and the orderly growth of the industry.

When the antimonopoly and proagrarian contingent argued that legislation was needed to ban pooling agreements and discriminatory rate structures in the railroad industry, prorailroad forces argued that Congress should create an independent commission that would decide each case on an individual basis (Horowitz, 1989; Schlesinger, 1951; Tedlow, 1983). Congress passed the Act to Regulate Interstate Commerce and the Interstate Commerce Commission was created in 1887.

The Interstate Commerce Act of 1887 prohibited unreasonable rates, pooling arrangements, rebates, and rate discrimination. The act also gave the ICC the authority to investigate violations of these rules (Schlesinger, 1951; Tedlow, 1983). The Commission consisted of five members who were appointed by the president to serve 5-year staggered terms. Only three Commissioners could come from any one political party, and each member had to be confirmed by Congress. However, the charter for the Commission was vague, and Congress set up the ICC as a fact-finding body without direct regulatory authority. The only way the Commission could enforce the rules was by taking a railroad company to court. However, the courts consistently struck down repeated attempts by the Commission to create administrative law unless it could show a direct link to the Interstate Commerce Act (McCraw, 1980; Wetlaufer, 1999). The legal formalists on the Court were strongly inclined to favor private common law over public and statutory law, and it was not until Congress added to the authority of the Commission and broadened its jurisdiction in 1903 with the Mann-Elkins Act, that the ICC had any real enforcement power (Mann-Elkins Act, 1917).

In spite of the Commission's inconsistent mandate, it did succeed in bringing a modicum of economic rationality to the railroad industry (Horowitz, 1989; Tedlow, 1983). The industry became increasingly consolidated, and by the turn of the century, six large corporations owned more than half of the nation's railroad lines. However, rates fell considerably and gross rate discrimination was eliminated (Schlesinger, 1951). Although it could be argued that consolidation had done more to revive the economic health of the industry than did the ICC, the precedent of establishing a federally mandated administrative agency to regulate national commerce that served a public interest was firmly established as a legitimate method of maintaining checks on corporate control of vital industries.

The new Commission thus represented a transformation in the classical liberal paradigm. The acknowledgment that a classic free market approach to economic regulation had ill served the railroad industry, its clients, and the public was in fact a larger reaction to the innumerable problems that could not be rectified by allowing a theoretically purer form of capitalism to go unchecked. As Congress, the courts, and the ICC began to clarify a new form of corporate liberalism, the rationale that had led them to regulate interstate commerce on the railroads did not encompass the growing communications industry until the turn of the century.

The Telegraph

Streeter (1996) asserts that the social construction of the broadcast industry required the creation of property rights on the electromagnetic spectrum where it took an act of collective imagination to create them from the ether. However, in the case of telegraphy, individuals and corporations owned something more tangible, the wires that made communication possible. The formalists could not, or would not, imagine the right to communicate as anything more than the right to pay for the privilege of using privately owned telegraph lines (Horowitz, 1989; Wetlaufer, 1999). Given the context of the times, there could be no rationale offered for the federal regulation of the telegraph. However, as telegraphy advanced, and developing technology enabled communication without wires, the economic pattern that began in the railroad industry repeated itself (Czitrom, 1982; Engelman, 1996; Horowitz). When Samuel Morse was granted a patent for his version of the telegraph after receiving government subsidies to develop his experimental telegraph line, many people, including Morse himself, envisioned the telegraph as a revolutionary communications tool that had the potential to further participatory democracy. However, the courts did not embrace this discourse of technology—a set of assumptions about the promise of a new tool to unite the continent through its ability to facilitate faster communication. Consequently, when Morse offered his patent to the government, the offer was declined (Barnouw, 1966). After the government rejected his patent offer, Morse and his investors began to license small, geographically dispersed companies to develop telegraph lines (Horowitz). By 1849, there were three competitive lines on the Boston to Washington and New York to Buffalo routes. Aside from indirect government subsidies in the form of access to right-of-ways and timber, it was the demand from business that spurred the development of the telegraph. Corporations embraced essential parts of Morse's visions about the new technology, but they had different motivations for supporting the growth of the telegraph.

The telegraph enabled the growth of corporations because it lowered transaction costs and allowed for centralized management (Tedlow, 1985).

The telegraph also enabled distant companies to compete in local markets, increasing competition regionally, while encouraging the tendency toward the growth of corporate monopolies (Czitrom, 1982; Engelman, 1996; Horowitz, 1989). Additionally, during the period between 1845 and 1854, when telegraph lines were rapidly expanding, seven major commodities exchanges were founded that made it easier to capitalize the expansion of the lines. By 1852, there were over 23,000 miles of telegraph wire in use. By 1866, Western Union controlled 75,000 miles of wire. Unlike with the railroads, neither the courts nor Congress was willing to assign a common carrier status to the telegraph; apparently, the telegraph was not affected with a public interest. By 1909, when American Telephone & Telegraph (AT&T) acquired Western Union, reformers bemoaned the state of the medium. "Behind the various political proposals for telegraph reform lay a sense of betrayal of the telegraph's original promise to be the common carrier of public intelligence" (p. 12). However, by that time, experiments with wireless telegraphy caught the attention of the public, and the contradictions between allowing one or a few corporations to control the transmission of information in a supposedly free market economy were not resolved.

Wireless and Beyond

By the time Guglielmo Marconi and his wireless telegraphy apparatus appeared on the scene in America in the early 1900s, he had already convinced investors in Great Britain that wireless telegraphy could be used on ships to communicate in places where no wires could be laid (Archer 1938; Douglas, 1987). After a series of accidents at sea, Congress passed the Wireless Ship Act in 1910 (Barnouw, 1968; Sterling & Kittross, 1990). This legislation required all ocean-going U.S. ships with 50 passengers or more to carry a radio apparatus capable of reaching at least 100 miles and to have a skilled radio operator on board at all times. Marconi's company was well established to take advantage of the new regulation, and he had a corner on the shipping market. However, by this time, the airwaves were becoming increasingly crowded with messages from amateur operators, and the Navy claimed that its own messages were being drowned out by interference. The U.S. Navy claimed that the amateurs were endangering national security. This was seen as a technological problem that needed to be addressed.

When radio's popularity became too dramatic to ignore, both AT&T and General Electric (GE) employed a defensive strategy of buying as many patents as they could to protect their dominance in electronic communication (Barnouw, 1968; Engelman, 1996; Sterling & Kittross, 1990; Streeter, 1996). AT&T began to see radio as a possible competitive threat to their telephone business. GE also began experiments to improve the technology.

When the United States entered the fighting in WWI in 1917, the Navy seized control of all radio stations for military use (Barnouw, 1966; Sterling & Kittross, 1990). Assistant Secretary of the Navy Franklin D. Roosevelt suspended all patent claims for the duration of the war so that all of the major distributors of radio technology could work together to supply the military with vacuum tubes, transmitters, and receivers. A massive effort to supply the military's needs would require the use of all available patents. GE and Westinghouse, the two major producers of light bulbs, were now enlisted to manufacture vacuum tubes. By the end of the war, GE, Westinghouse, AT&T, and

American Marconi owned all the major patents in radio technology. The corporations and the Navy, aided by civilians who had experimented with radio as amateurs, developed technological innovations that would fuel a radio boom.

When the war ended, the military argued that it should retain control of the airwaves, and a bill was introduced in Congress that would allow the government to compete with private commercial interests in the acquisition of radio stations (Engelman, 1996; Sterling & Kittross, 1990). The Alexander Bill allowed for a potential government controlled network of stations. The amateurs and the Secretary of the Navy supported the bill. There were legislators who believed that it had been a mistake to allow private companies to gain a monopoly over the telegraph and telephone industries, and many other countries decided to fund radio publicly. Some members of Congress considered a monopoly in radio to be inevitable, so they felt that adopting the bill was merely pragmatic (Barnouw, 1966). Opponents to the bill argued that radio should be treated as a natural monopoly, similar to telephony, and that the issue was not whether there would be a radio monopoly in the first place, but whether the government should retain control of it. Still others noted the use of propaganda over the air during the war, and they were leery of ceding that much power to the military. The Marconi Company and AT&T were opposed to the Alexander Bill and pressured Congress to kill it, which they did in 1918, thereby continuing the precedent of allowing commercial interests to dominate access to communications technology. In mid-1919, the government lifted the ban on private radio stations, and when the military personnel who helped develop radio technology for the radio returned home, they resumed their experimentation with a vengeance.

Marconi approached GE with a proposal to buy several of the high-powered transmitters that it manufactured for the Navy during the war and promised to continue purchasing transmitters in the future. If the deal went through, Marconi would have been the only corporation to own the transmitters (Sterling & Kittross, 1990). In exchange for the transmitters, Marconi agreed that GE would retain the exclusive right to manufacture them in the future. However, in a shrewd political move, General Electric forwarded the details of the agreement to the Secretary of the Navy before the contract was signed. This set off a chain of events when the military strongly suggested that it would be against the national interest to allow a foreign company to obtain a complete monopoly in the radio industry. Meetings were held with GE's board of directors and all agreed that the deal would create an untenable situation.

Consequently, GE approved the formation of a new corporation, the Radio Corporation of America (RCA), and its articles of incorporation prohibited foreign citizens from becoming officers. It also limited foreign stockholders to less than 20% of the company's holdings (Barnouw, 1966). Almost all of Marconi's terrestrial stations were still in the hands of the Navy, making it unlikely that the government would return control to a foreign-owned corporation. Thus, Marconi decided to sell the assets of American Marconi to the new corporation. The government sanctioned the sale and agreed that RCA would be the *chosen instrument* of the government in meeting America's overseas communication needs (Sterling & Kittross, 1990; Witherspoon et. al., 2000). After RCA absorbed the assets of American Marconi in 1919, all government-held land stations were transferred to the new corporation. RCA quickly established an international monopoly in commercial wireless transactions (Barnouw, 1966; Sterling &

Kittross). That same year, RCA entered into an agreement with AT&T and its subsidiary Western Electric. In exchange for stock in RCA, AT&T and GE agreed to pool their competing patents. Westinghouse, which had built an experimental broadcast station in Pittsburgh, joined forces with RCA as well. GE and Westinghouse agreed to manufacture radio sets and supply them to RCA. RCA would sell GE and Westinghouse receivers and would continue its international business. AT&T could then sell radio receivers and lease its lines for radiotelephony. The government sanctioned this agreement, which effectively created an environment that encouraged American corporate control of the airwaves. RCA would be allowed to obtain a "natural monopoly" in the radio industry.

As more stations began to broadcast regularly scheduled programs and as more members of the public purchased radio receivers in the early 1920s, radio became more popular (Douglas, 1987; Engelman, 1996; Streeter, 1996; Witherspoon et al., 2000). There were many public discussions about the potential of radio. The discourse of technology that Morse had first applied to the telegraph gained more adherents when it came to radio. Magazine articles heralded radio as a tool for uniting the nation. There was a great deal of discussion about how radio could be used to advance education and cultivate a more participatory democracy, and many thought radio would eliminate class distinctions by providing universal access to information (Witherspoon et al., 2000). However, radio was merely a technology that permitted transmission of information across distances. None of the utopian visions for how it could be used could be realized without the production of the content that could achieve these laudatory goals. The technology itself could only transmit signals through the electromagnetic spectrum.

Nonetheless, the nation was captivated by broadcasting's imagined potential (Barnouw, 1966; Douglas, 1987). During this period, department stores broadcast live performances as a way to lure in shoppers and provide positive publicity for their stores. Newspapers, such as the *Detroit News* started broadcasting because they viewed radio as an electronic extension of their news-gathering operations (Barnouw; Streeter, 1996). Educators went on the air to publicize their schools and offer classes over the air, unions and socialists took to the air, and churches' began broadcasting religious programming.

The Radio Act of 1927

By the 1920s, there was a growing recognition that some regulation of radio would be necessary (Barnouw, 1966; Sterling & Kittross, 1990; Witherspoon et al., 2000). At this point, the U.S. economy had undergone the transformation from an agrarian-based system that included the classical liberal free market and all that it entailed to one dominated by corporations (McChesney, 1993; Streeter, 1996). The social, political, and legal assumptions that provided the rationale for government policy during the previous century had to undergo a transformation, even if some of the assumptions of the earlier eras remained. However, the political climate of the country had changed by the time broadcasting appeared on the nation's consciousness (Schlesinger, 1951; Wiebe, 1967). The Progressives at the turn of the century demanded reform in industries that had come to be dominated by monopolies. President Theodore Roosevelt was associated with the trust-busting movement, and like the ICC, other regulatory agencies that arose during the early years of the 20th century were created to bring stability to industries buffeted by the extremes of a laissez-fair policy run amok. By creating so-called natural monopolies in the transportation and communications industries, regulators protected the capital investments of corporations such as Western Union, AT&T, and the railroads so that development of services would proceed smoothly and would be available to a large proportion of the public at reasonable rates.

Many historians and communication scholars have described the period between the 1880s and 1920s as a transitional period where the classically liberal way of imagining American government, its institutions, its economy, and the structure of society gave way to a new order that resulted from the fundamental restructuring of American life (Horowitz, 1989; Lustig, 1982; Streeter, 1996; Tedlow, 1985). One of the basic characteristics of this new order was that the courts, the legislature, and industry leaders began to shift their orientation from a focus on the right of an individual to engage in commerce free from restrictions to an outlook that allowed industry to consolidate. The transformation assumed that large capital investment could further progress for all and serve a more populous nation more efficiently in the new era. By the time Secretary of Commerce Herbert Hoover assumed his post in 1922, his view of how commerce should be structured was common (Benjamin, 1998; Hawley, 1974; Sarno, 1969). He, like the legal formalists at the turn of the century, believed that the market was the best regulator. This was in keeping with his larger vision of how society should be organized, and that vision profoundly affected the way that the business of broadcasting came to be structured. Hoover was the quintessential corporate liberal, and along with other government and corporate leaders, he believed that organized cooperative associations between business and government could best serve society.

> Hoover [in 1921] saw himself as a protagonist of a new and superior synthesis between the old industrialism and the new way whereby America could benefit from scientific rationalization and social engineering without sacrificing the

> energy inherent in individual effort, ‘grassroots’ involvement, and private industry. (Hawley, 1969, p. 117)

In other words, Hoover believed that if scientific and corporate expertise could be organized properly on a voluntary basis, governmental regulations and legal coercion could be avoided (Hawley, 1969). He believed that business and government could work together to solve their mutual problems informally by forming mutually beneficial interpretive communities. The cooperative organizations that he envisioned took the form of trade associations. These private organizations would serve the public. Hoover believed that the expertise of corporate managers, combined with the scientific knowledge produced by private enterprise, would allow corporations to govern their own businesses according to standards that would serve the public interest. These associations were to create codes of ethics and standards of practices for their members. Hoover believed that political conflict could be avoided by taking an objective engineering approach to social problems. Hoover believed that most political controversies could be abated by focusing on the technical solutions to problems that could be solved by men of talent, vision, and expertise.

Accordingly, when Hoover called the first in a series of radio conferences to order, he saw radio as a scientific problem that could be solved by employing technical expertise to create order in a chaotic environment (Barnouw, 1966; Benjamin, 1998; Hawley, 1974; Sarno, 1969; Streeter, 1996). Order in the industry would provide a public service. This assumption that the problem of radio was a technical one precluded the possibility that other dimensions of radio, most notably its educational, political, and cultural potential, would be given a prominent place in the discussion of how to regulate the spectrum (McChesney, 1993; Streeter, 1996). The other dominant assumption of

Hoover's associative vision for society was that capitalism, in the form of corporativism, was the only rational way to organize wealth in the 20th century. In Hoover's view, the corporations had brought order to the chaotic process of industrializing the economy, and an orderly society was the key to progress. Capital invested in radio by private corporations needed to be protected for the public's interest to be served. Thus, the amateurs and educators who invented radio, who operated with delicious abandon and unstructured enthusiasm, were seen as a threat to the corporate order, an order that was necessary, at least in Hoover's estimation, to properly develop this national resource.

Hoover held four radio conferences between 1922 and 1926 (Benjamin, 1998; Engelman, 1996; McChesney, 1993; Sarno, 1969). The attendees were largely technical experts from RCA. The focus was on creating an orderly structure from which broadcasting could be developed given the limited capacity of the electromagnetic spectrum. In 1923, Hoover instituted three levels of radio broadcasting service (Sterling & Kittross, 1990). Clear-channel stations had the right to broadcast at a maximum level of power that could reach across a wide geographical terrain, regional stations could broadcast their signal with lower power, and local stations could only broadcast on weak signals during the daylight hours. However, Hoover's efforts to establish a hierarchy of licensees was invalidated by the courts on the ground that he had exceeded his authority as Secretary of Commerce (*United States v. Zenith Radio Corporation et al*., 1926). By 1927, the "industry was now hopelessly out of control and begged for legislation to relieve the chaos that threatened to destroy this young but potentially powerful medium" (Witherspoon et al., 2000, p. 4).

Congress finally stepped in and passed the Radio Act of 1927 (Benjamin, 1998; Engelman, 1996; McChesney, 1993; Sarno, 1969). The Radio Act established a temporary Federal Radio Commission (FRC) that had the authority that the Secretary of Commerce lacked (Public Law No. 632, 1927). Like the ICC, the FRC was made up of five members who were appointed to serve 6-year staggered terms. The Commissioners came from different geographic areas, and it was their task to allocate licenses and protect the integrity of the spectrum.

The FRC was charged with regulating broadcasting in the name of the *public interest*, *convenience, or necessity* (Radio Act of 1927 §3). This provision indicates that legislators distinguished broadcasting from other communication technology and from other industrial endeavors. Congress expressly declared that the electromagnetic spectrum was a publicly owned resource. Therefore, the FRC was designated to protect the integrity of the spectrum but also also protect the integrity of the service provided to the public.

Despite the mandate to regulate the spectrum according to the public interest, convenience, or necessity, there was little discussion of what types of radio service would benefit the public (Engelman, 1996; McChesney, 1993). The FRC was an expedient solution to a pressing problem that needed immediate resolution. The structural components of the commercial model of broadcasting were not considered in the discussions leading up to General Order 40, the order that reorganized the broadcast spectrum (Radio Service Bulletin No. 137, 1928). When the FRC was deliberating the matter of how to assign channels, it solicited input from the National Association of Broadcasters (NAB) but not groups representing educational interests or other noncommercial broadcasters (Benjamin, 1998). The public was not consulted. After the first conference in 1922, participation was largely limited to industry representatives and engineers who were affiliated with commercial interests. The chief engineer for AT&T appointed the engineers advising the FRC.

The FRC announced a reassignment plan in 1928 (Engelman, 1996; McChesney, 1993). There would be 40 clear-channel station allotments, 34 regional channels, and 30 low-power, local stations assigned to each region (Radio Service Bulletin, No. 137, 1928). Licensees would be subject to renewal hearings every 3 years and many stations were required to share a frequency, thereby ensuring that one or both stations would not be able to gain the audience required to make them financially sustainable (Sterling & Kittross, 1978). One hundred stations were eliminated in this manner. According to McChesney (1993, 1999) when the aftermath of the Radio Act of 1927 became evident, it was clear to all concerned that the commercial model of broadcasting would dominate the ether and that this model would be unable to accommodate the goals of educators, community, or special interest groups. According to Aufderheide "the unarticulated assumption underlying the regulation of broadcasting from its inception was that the ether was a virtual public culture" (1999, p. 226). However, General Order 40 did nothing to advance this goal. Instead, it successfully eliminated the problem of interference without considering the content of the communication that would be offered to the public. The Communications Act of 1934 created a permanent FCC and gave the FCC jurisdiction over all aspects of the communications industry. Aside from minor modifications, the act contained essentially the same provisions as the 1927 Radio Act, including the condition that broadcasters held their licenses in the name of the public trust and that all broadcasters must abide by the public interest, convenience, or necessity.

The Marketplace of Ideas

Less than a year after the Radio Act of 1927 passed, the newly appointed FRC issued a public statement designed to clarify the public interest provision of the Radio Act (2 FRC Ann. Rep 166, 1928). The Commission reiterated the importance of maintaining spectrum integrity but also said that it was important to provide the public with different types of radio service. The Commission explicitly stated that they would not look favorably on duplication of programs or services in the geographic location when allotting licenses (Kahn, 1984), the implication being that diverse programming, and diverse ownership of stations, was in the public's interest. The Commission also said it was important to maintain local service, and noted that there were many more people who wanted to obtain broadcasting licenses than were channels available. Accordingly, broadcasters that were allotted licenses had a special responsibility to serve the public interest. The Commission stated: "The emphasis must be first and foremost on the interest, convenience, and necessity of the listening public, and not on the interest, convenience, and necessity of the individual broadcaster or advertiser" (Kahn, 1963, p. 63). Despite this statement, later that year, the FRC announced that it was allotting all but 3 of the 40 clear-channel, long-range frequency assignments to the two existing commercial networks. Others would be assigned regionally.

Although the language in the Radio Act of 1927 could be traced back to earlier attempts to regulate the railroads in that the public interest, convenience, or necessity, the phrasing reflected the earlier common law concept of affection with the public interest;

there was no attempt to categorize broadcasters as common carriers (Benjamin, 1998; Sarno, 1968). In fact, although the new plan ostensibly declared that broadcasters were only allowed to use portions of the electromagnetic spectrum in exchange for serving the public interest, this provision essentially gave broadcasters the privilege of using spectrum space without promising to provide public access. The Act also gave these same corporations (who controlled other sectors of the communication industry) what amounted to a right of condemnation. That is, corporations were allotted the most valuable spectrum real estate while amateurs, educators, and other special interest groups were pushed to the margins. These conditions were all but certain to lead to a repetition of the economic patterns that plagued the telegraph, telephone, and railroad industries.

The phrase “public interest, convenience, or necessity” was ambiguous at best, and Congress failed to specify its precise meaning (Aufderheide, 1999; Avery, 2007; Avery & Stavitsky, 2003; Streeter, 1996). Instead, the new administrative agency would make its own interpretations on a case-by-case basis over the ensuing decades. The FRC had to reconcile many contradictory beliefs about how the industry should be regulated and supported. The hallmarks of corporate liberalism included faith in expertise and the liberating effects of technology. Hoover’s vision of the associative state also expressed the view that creating economic efficiencies in industry would serve the greater good and that capital raised by privately owned or publicly owned corporations was superior to government restrictions and regulatory coercion. Hoover’s faith in industry to act in its own self-interest, thereby serving the public interest, would soon be called into question during the Depression, but nonetheless, his vision was the foundation for the principles contained in the Radio Act of 1927.

However, at the same time that Hoover and Congress were busy setting up the regulatory regime that would govern broadcasting for the remainder of the century, much of the values held during the earlier era remained (Horowitz, 1989; Lustig, 1982; Streeter, 1996). The property rights of individuals were still sacrosanct despite the fact that Congress had expressly declared that the rights of broadcasters were only a temporary privilege granted according to how well they performed a public service. Even though the FRC had declared that service to the community of license was the paramount definition of public service, the foundation of corporativism was designed to take advantage of economies of scale through the organization of business interests on a national and regional basis. When Hoover endorsed the formation of RCA, he rejected the proposition that locally owned broadcast stations could compete in an open market to produce the best programming for the public. As the Supreme Court began to expand the First Amendment rights of individuals, the FRC and later the FCC were intent on restricting the rights of individual broadcasters to control the airwaves. As Hoover's vision of the associative state gave way to the New Deal era, these conflicts went unresolved.

The Progressive era spawned federal regulatory agencies that sought to protect small producers from large corporations, but by the time the FCC came into existence, the country was suffering from the effects of the Great Depression (Aufderheide, 1999, Horowitz, 1989). During the New Deal era, federal regulatory agencies were required to encourage the economic growth and stability of the industries they controlled so the public could be served with increased access to dependable, affordable services. When the FCC allowed broadcasters to monopolize their allotted portion of the electromagnetic spectrum, they did so with the caveat that the broadcaster must operate as a public trustee. Spectrum space was scarce, so those who were granted the privilege to broadcast had a social responsibility to the public. As the early chaos on the airwaves gave way to a more stable structure, regulators turned their focus to the public interest component of their duties and devoted much energy over the years to the social intent of the legislation that created the agency.

Station Ownership Limits

From 1928 on, the FRC, and later the FCC, operated under the theory that the public interest would best be served by promoting the diversification of broadcast viewpoints as well as preventing undue concentrations of economic power in the broadcast industry (*Prometheus Radio Project v. FCC*, 2004, p.16). Regulators, who had once sanctioned RCA as the chosen instrument to dominate the new field of broadcasting, were now forwarding policies that promoted a competitive marketplace of ideas. Accordingly, the Commission sought to promote diversity and competition in broadcasting by limiting the number of radio stations a single party could own or acquire in a local market. After the courts ratified the Commission's ability to make public interest evaluations when issuing licenses, the FCC took steps to enlarge its criteria for measuring an applicant's public service obligations (*Great Lakes v. the Federal Radio Commission*, 1930). In 1938, the FCC denied an application for a new AM station from a candidate that already controlled an AM station in the same community (*Genesee Radio Corp., v. FCC,* 1938). The Commission reasoned that there would be no competition between two commonly owned stations in the same community and that, consequently the situation would not encourage new applications from other potentially more diverse licensees. Therefore, in order to assure a substantial equality of service to all interests in a community and to assure diversification of service and advancements in quality and effectiveness of service, the Commission held that it would “allow commonly owned duplicate facilities only where it would fulfill a community need that otherwise could not be satisfied” (*Genesee Radio Corp*, 1938, p. 186).

This was the first of a long series of regulations that would be instituted by the FCC with regard to broadcast ownership policies that were proposed to serve the public interest. The assumption that diversity of ownership was the equivalent of diversity of opinion went unchallenged.

By 1940, 95% of all radio was network owned or affiliated (Barnouw, 1968; Baughman, 1981; Sterling & Kittross, 1990). Many members of Congress and some in the broadcast industry believed that the FCC had not done enough to break the monopolistic tendencies of the networks (McChesney, 1993). In 1941, the FCC issued its *Report on Chain Broadcasting* and announced that it would not issue a license to more than one station in the same area to a single network, and again regulators did not challenge the assumption that diversity of ownership equaled diversity of opinion. The networks, which had the most to lose, were the only ones who contested this assumption (FCC, 1941). The report declared that increased competition in network broadcasting would serve the public interest (Barnouw, 1968; Kahn, 1984; Sterling & Kittross, 1990). The Federal Trade Commission and the FCC, after prevailing in a protracted court battle, forced NBC to sell off its Blue Network, which became the American Broadcasting Company (*NBC v. U.S.*, 1943).

Also, in the 1940s, the FCC issued a series of rules designed to prohibit common ownership of stations providing the same type of broadcasting service in a single community (DeClerk, 2005; Emord, 1989; Kahn 1984). This included a prohibition against licensees having any financial interests in any competing broadcast stations. The FCC reasoned that if one station owner had an interest in promoting another station in the same service area, there would be a lesser likelihood of competition between the stations. The FCC expanded the financial interest prohibitions over the years to forbid licensees in the same community from forming consulting relationships, from forming time brokerage agreements, or from forming commonly owned advertising agencies. These rules were formulated to maintain diversity of ownership in broadcast markets through competition and existed until 1989. As the feasibility of operating FM stations moved forward and the viability of television loomed on the horizon, the FCC issued its first duopoly rule (Aufderheide, 1999; Horowitz, 1989; Keller, 2004; "Rules," 1940). The rule prohibited AM station owners from acquiring licenses for another FM station or another television station in the same market. In 1940, the Commission also issued its first national multiple ownership rules and required any licensee that wished to own or operate more than three television stations and six FM radio stations nationwide to provide proof that such ownership would encourage competition. In 1944, the FCC amended that rule to allow a single owner to control five television stations, six FM stations, and seven AM stations nationwide but by 1946, the FCC allowed a single licensee to own up to seven AM stations, seven FM stations, and seven television stations nationwide. When Storer Broadcasting Company challenged the legitimacy of maintaining caps on national ownership of broadcasting facilities in 1956, the Supreme Court affirmed the FCC's authority to do so (*United States v. Storer Broadcasting Co.,* 1956). The multiple ownership rules were amended once again in 1964 to define more precisely the standard for determining the boundaries of overlapping service areas (*Multiple Ownership Rules,* 1964). These rules remained constant until the 1970 when the FCC expanded its ownership rules to accommodate changing market conditions.

By 1964, the FCC was concerned about the growth of consolidation in national broadcast markets and adopted an interim Top 50 policy (Emord, 1989; Horowitz, 1989). This policy required that a hearing be held if any licensee wished to obtain a second VHF television station in any of the top 50 markets in the nation. The potential licensee had to show that there was a compelling public interest involved if the applicant wished to acquire a second station. The following year, the FCC amended this policy so that no licensee could own more than three VHF television stations and two UHF stations in any of the top 50 markets in the country. In 1968, the FCC required that anyone wishing to own up to four UHF stations in any of the top 50 markets could do so if the applicant could show that there was a compelling public interest for multiple ownership.

During the 1970s, the FCC passed several measures designed to impede the growth of consolidation in the broadcast industry (Emord, 1989; Horowitz, 1989; Krasnow et al., 1982). In 1970, the Commission instituted its one-to-a-market rule. This regulation prohibited a licensee from owning more than one broadcast station in a community. Again, the FCC reasoned that diversity in ownership of broadcasting outlets in a community would be equated with diversity of broadcast voices. Therefore, this rule met its public interest mandate. The following year, the Commission amended the rule to allow AM/FM combinations in a single market as a means to encourage the growth of FM outlets.

In 1970, the Commission also passed regulations that restricted cross-ownership of broadcast properties in communities (Emord, 1989; Horowitz, 1989; Krasnow et al., 1982). The Commission said that it would not allow a licensee of a television station to purchase an interest in a cable television system, or to purchase additional television stations in the same community. The Commission also prohibited networks from owning cable systems and did not allow telephone companies to purchase interests in cable systems. These barrier-to-entry restrictions were forwarded to prevent consolidation in the broadcast and cable industries so a diversity of voices could be accessed by the public and so existing services would be protected.

The same justification was offered when the FCC banned newspapers from owning broadcast licenses in the same communities and vice versa (Emord, 1989; Horowitz, 1989; Krasnow et al., 1982; Levi, 2000). This law was not retroactive, so existing cross-ownership relationships were grandfathered in, but the principle of encouraging diversity of ownership under the public interest mandate was upheld by the courts (Emord, 1989). The Supreme Court held that the cross-ownership ban was a "reasonable means of promoting the public interest in diversified mass communications" (*NCCB v. U.S*, 1978, p. 802). In an effort to limit the number of broadcast stations that any one licensee could own nationwide, the FCC instituted a policy against regional concentration in 1977. The policy banned ownership of more than three broadcast stations in a region if the two stations were within 100 miles of the third.

Throughout its history, the FCC periodically attempted to regulate the content that broadcasters offered their audiences, most notably when it issued its report on the *Public Service Responsibilities of Broadcast Licensees* (Baughman, 1981; Friendly, 1967; Kahn, 1968). These attempts to require programming that was thought to encourage civic dialogue, or other public interests were not often successful, perhaps due to the deep ambivalence that many citizens and government officials felt about having regulators dictate what programming was good for the public. However, regulators were able to obtain greater levels of support for policies that favored diversification of ownership because of the public's historical aversion to the unchecked growth of corporations across industries. The Commission's long-held policy of encouraging diversity in local and national markets was intended to allow the public to access a full range of perspectives on topics of local and national interest (Armstrong, 2002). Even though members of the broadcast industry did not favor the Commission's attempts to limit the holdings of large media corporations, there was widespread public and political support for these policies throughout the 1970s.

Public Participation

During the 1950s, there had been a series of scandals involving members of the FCC (Baughman, 1981; Horowitz, 1989). The always close relationship between the agency and the industry it regulated led to a series of corruption charges and resignations. As the communication industry grew, it became more diversified, and more complicated, and the FCC was increasingly seen as ineffectual and bureaucratic. The FCC's attempts to define the public's interest with regard to television programming had failed, and the regulatory agency was perceived of as a nuisance by the industry. If citizens favored entertainment over news and public affairs programming, and if the corporations that dominated the airwaves were receiving more revenue from producing entertainment than they were from more intellectual fare, the FCC could do nothing about it.

The FCC had no real power to formulate or enforce policy, and its decisions gained little attention in the press (Baughman, 1981). Still, some citizens were worried about the effect of violence and crass commercialization in broadcasting. By the late 1950s, " a critical consensus developed that television had become a social problem, had come to be widely shared by many of those contemplating the nation's problems" (Baughman, p. 54). Between 1958 and 1960, television was under attack. Intellectuals and political leaders bemoaned television's tendency to reflect the worst of American society. There was a sense that television programming had entered a steep decline since the early golden years of the 1950s (Minnow, 1965; Sterling & Kittross, 1990). Another concern stemmed from the negative role of advertising on television and in society at-large.

During the 1960s and 1970s, many members of society questioned the legitimacy of institutions that were the cornerstones of civic life (Krasnow et al., 1982; Ranly, 1976; Sterling & Kittross, 1990). There was a general distrust of large corporations in many industries. The mass media were not immune to this type of examination, and in fact it was a focal point for the frustrations of citizens who were critical of the culture they believed the media were perpetuating (Armstrong, 1981). Grassroots organizations dedicated to reforming the excesses of the media sprang up all over the country (Grundfest, 1976; Krasnow et al., 1982; Ranly, 1976; Rowland, 1982). These organizations put pressure on commercial broadcasters to put an end to violence and the amount and type of commercial advertisements on children's programs. They demanded that broadcasters remove all liquor and tobacco advertisements from television, and they insisted that television was contributing to harmful racial and ethnic stereotypes. Media activists called for more public input into the regulatory process and they put the industry on notice that they intended to take advantage of all of their rights and responsibilities as citizens.

The Office of Communication of the United Church of Christ had successfully challenged the license renewal of a station in Jackson, Mississippi, that aired blatantly racist programming (Grundfest, 1976; Korn, 1991; Krasnow et al., 1982; *Office of Communication of the United Church of Christ. v. FCC*, 1966; Ranly, 1976; Rowland, 1982). That case established the legal right for public participation in the regulatory process, and for the first time citizen groups began to challenge license applications and renewals. Broadcasters sometimes found that it was easier to bargain with the groups than to fight them outright. Local groups were getting together and starting their own listener-supported community radio stations with volunteer programmers and broadcasts of local public affairs (Milam, 1975; Soley, 1999). Activists demanded better programming for children. In 1967, Congress passed the Public Broadcasting Act, the mechanism that fostered a national network of public television and radio stations. Beginning in 1970, cable television began offering access channels to the public, and many cities around the country experimented with locally produced programming (Engelman, 1996; Linder, 1999). Alternative press publications began to appear and journals devoted to analyzing the media were founded. During this same era, while the FCC was tightening its ownership restrictions and while citizens were demanding more and better services from the telecommunications industry, the development of new communications technologies were threatening to disrupt the established order of America’s structure broadcasting.

The Romance of Cable

Community Antenna Television (CATV) was created in the 1950s to boost the transmission of local broadcasting stations in rural areas that had poor reception (Horowitz, 1989; Streeter, 1987). The early systems did not transmit original programming. At first, local broadcasters welcomed CATV because it brought them more viewers. However, when experimental cable operators began distributing programming that did not originate in local communities, the network affiliated stations started to see cable television as a threat to their dominance. In 1962, the FCC began to deny cable operators the right to carry distant broadcast signals for two reasons. First, the FCC reasoned that if cable system operators were allowed to carry imported broadcast signals into a local market it would fragment local audiences and weaken broadcasters’ ability to earn revenue and affect their ability to produce local programming. The other concern was that if cable operators were allowed to retransmit programming originated elsewhere, they would enjoy an unfair competitive advantage over affiliates that had to pay to produce or carry the programming. Consequently, the FCC passed a series of regulations designed to protect affiliate stations. The cable industry languished for many years.

However, the fortunes of cable television began to change when media activists and regulators came to see cable television as a possible alternative to the offerings of the networks and established broadcasters. As Streeter (1987) put it, “a discourse of new technologies" became prevalent in the 1970s (p. 174). This way of thinking about technology had almost religious overtones to it and provided a utopian vision of the promise of new communications technology. This was nothing new, as people had proclaimed that a new, more democratic age of communications was upon us when other technologies, such as the telegraph and radio had surfaced, but in the light of such widespread dissatisfaction with the status quo during the more recent era, people embraced the "cable fable" with particular zeal.

Even though the Supreme Court reaffirmed the validity of the spectrum scarcity doctrine in *Red Lion v. FCC* during the 1970s, the prospect of cable systems with multichannel carrying capacities entranced groups as varied as educational broadcasters, minority advocates, foundations, and consumer advocates (Engelman, 1996; *Red Lion v. U.S.*, 1967, Streeter, 1987). By embracing the potential of cable as a means of deliverance from what many saw as inferior offerings by established broadcasters, these groups reasoned that the lack of spectrum space, not a lack of imagination, was responsible for the dearth of quality programming available on broadcast television. Therefore, according to this line of reasoning, since cable had a multichannel carrying capacity, more people would have the ability to produce programming, and that fact alone would provide more and better options for viewers. Not only would viewers have more options with cable, but minorities and other marginalized groups would also have more outlets for expression. Furthermore, if cable could achieve its potential for enlarging the public sphere, it could lead to a more equitable and egalitarian society. In retrospect, it is easy to see that cable could never have fulfilled these lofty expectations, but at the time, people believed in the romance of cable. The nation's persistent infatuation with new technologies would continue to be a theme echoed repeatedly by regulators, citizens, and academics.

The FCC's Third Report and Order on Cable Television in 1972 was designed to cultivate the Commission's broader goals of encouraging localism and diversity (Copple, 1991; Engelman, 1996). The FCC required cable systems in the top 100 markets to provide a minimum of 20 channels including at least 3 free public access channels for government, educational, and citizen use. The FCC also required systems operators to lease unused channels to other entities. This optimistic policy statement was designed to grease the way for a new participatory form of communication.

Fowler and Friends

As the consumer movement came to a head during the late 1960s and 1970s, Congress passed legislation that created 20 of the nation's 55 regulatory agencies (Horowitz, 1989). Predictably, a slow burning backlash against regulations in general began to build momentum. By the late 1970s, the economy was stagnant. There was rampant inflation and a decline in productivity in many industries. Oil and gas prices were at record highs. Rates were rising for cable and telephone services and industry leaders saw the cost of conforming to social regulations to be excessively high. They blamed regulators for their lack of productivity.

By the end of the 1970s, the discourse of regulation was changing (Fowler & Brenner, 1982; Krasnow et al. 1982; McChesney, 1999). During the previous decade, regulatory reformers stressed the need for policy that would divorce administrative agencies from the industries that they regulated. Consumer advocates and other left-leaning activists perceived the roots of regulatory problems to be one of capture by the industries (Horowitz, 1989). If those agencies were forced to represent the public's interest rather than those of corporations, then reform could be accomplished. These activists opposed price and entry requirements in the telecommunications industry because they saw them as protecting the turf of huge corporations. At the same time, industry leaders and government officials came to embrace regulatory reform as a goal that would restore economic stability to their industries. To this interpretive community, those in the administration and industry, reform was equated with deregulation. A deregulated marketplace would ensure that the economy could grow unfettered and that would serve the public interest in the end. At the same time, free market economists were obtaining positions in the Ford administration and their influence was rising.

In 1978, Congress passed the Airline Deregulation Act (*Public Law No. 95-504*, 1978). The bill was passed by an overwhelming majority in both houses. In 1980, Congress passed legislation to deregulate the trucking industry, and it passed laws to deregulate the banking industry. President Ronald Reagan was elected, at least partially, because of his promise to reduce the size of the federal government, and deregulation was the political catchphrase of the Reagan administration

The political ideology of the Reagan administration stood in stark contrast to the philosophy of governing that was prevalent during the previous decades (Horowitz, 1989). The expansion of social welfare programs during the Great Society era promulgated the prospect of a more equitable distribution of society's resources, but when the national economy floundered, the assurances of the Great Society approach to governance appeared to be an illusion. The new administration vowed to shrink the size of the federal government and to do away with governmental regulations that inhibited the growth of industry.

Reagan was not the only one who wanted to curb the growth of government. Around the world, there was a trend toward privatization of industry, and public service broadcasting was in decline (Avery, 1993). When Reagan appointed Mark S. Fowler to head the FCC, he and his chief aide, Daniel Brenner, called for a market approach to broadcast regulation. In an influential article published in the *Texas Law Review*, Fowler and Brenner (1982) argued that the primary focus of the FCC should be to protect the First Amendment rights of broadcasters. In their view, the spectrum scarcity doctrine was not a valid rationale for continuing to uphold the public trustee model of broadcasting. The previous chair of the FCC, Charles D. Ferris had encouraged the liberalization of barriers to entry in broadcasting and cable, and initiated efforts to bring such new broadcast services as direct broadcast satellites, multipoint distribution services and low-power television into the market. Those actions began to disrupt the traditional structure of the telecommunications industry (Horowitz, 1989). There were also more independent television and radio stations nationwide, and many consumers could now access cable television and other program content via videotape. Therefore, according to Fowler and Brenner, the spectrum scarcity doctrine should not apply. According to their point of view, the government had no business dictating the structure and content of broadcasting. Instead, the FCC needed to allow economic efficiencies to determine what services and programming were accessible to audiences. Fowler and Brenner envisioned a day when the FCC would hold auctions for spectrum space and would collect revenue from the sale of station licenses. With Fowler leading the charge at the FCC, the Commission systematically struck down individual content and structural regulations in broadcasting (Aufderheide, 1999).

In 1984, the FCC raised the multiple ownership limits from 7 AM stations, seven FM stations, and 7 television stations to 12 of each. It dropped the trafficking rule that required station owners to hold onto a license for a minimum of 3 years, and eliminated cross-interest rules that prohibited licensees from consulting with or entering into time brokerage arrangements with competing stations in the same market. The Commission eliminated the regional concentration rule. After Congress objected to the specter of more consolidation in broadcasting, the Commission agreed to pass a cap on the number of broadcast stations that a licensee could hold. Licensees were prohibited from reaching more than 25% of the national audience.

Additionally, during the 1980s the FCC eliminated rules limiting the length of commercials on television programs and dropped minimum requirements for news and public affairs programming (Aufderheide, 1999). Also, under Fowler's leadership, the FCC rescinded rules that required station owners to keep programming logs and produce annual financial reports. In 1985, the FCC issued a report that said the Fairness Doctrine, a policy first instituted in 1949 to ensure that programming was balanced with divergent viewpoints, was unwieldy and therefore restricted the diversity of voices being broadcast (Report on the Fairness Doctrine, 1985). The FCC also noted that the Doctrine was impossible to enforce consistently. Two years later, the FCC formally repealed it (*re: Syracuse Peace Council*, 1987).

In contrast, in 1984, Congress passed the Cable Communications Policy Act that among other things, imposed ownership restrictions on cable system operators (Cable Communications Policy Act, 1984; Carter, Dee, & Zuchman, 2000; Copple, 1991). The act prohibited a television licensee, or common carrier from owning a cable system in the same coverage area, and it prohibited TV networks from owning cable systems, although a network could own an interest in a cable system. However, by the early 1990s,96 % of the nation had access to cable, but rates had soared, and Congress responded to consumer complaints with the Cable Act of 1992. This act relaxed some of the ownership restrictions. Now, network/cable cross-ownership rules allowed television networks to own cable systems as long as they did not exceed a national limit of 10% of the homes accessible by cable nationwide. Additionally, they could not exceed a cap of 50% of cable homes in any given area of dominant influence.

Summary

This chapter has demonstrated how the current legal regime that governs broadcasting was rooted in the earlier attempts to regulate the railroads. As the classical liberal values of the early 19th century adjusted to accommodate an industrialized economy, a corporate liberal paradigm replaced faith in a theoretically purer form of the free market. When the Interstate Commerce Act sanctioned consolidation within the railroad industry, regulators acknowledged that it was in the public’s interest to promote economic order and efficiency to build the nation’s infrastructure. By the time Congress passed the Radio Act of 1927, legislators tried to balance the need for an orderly structure for the technical and economic aspects of broadcasting while maintaining a belief that cultivating a marketplace of ideas in broadcasting would best serve the public. Subsequent legislation and court rulings attempted to maintain this balance by forwarding policy that restricted media ownership, encouraged localism, and discouraged consolidation.

This chapter also introduced the formation of the various stakeholder groups that exert an influence over policy decisions. The first legal opinions that allowed for the regulation of interstate commerce and the formation of administrative agencies began with the recognition that certain industries were affected with a public interest. Therefore, the courts allowed these industries to be subjected to legal privileges and restrictions. As government became more centralized, the power of Congress to shape the structure of emerging industries grew. When the FCC was permanently established by the Federal Communications Act of 1934, it became the primary stakeholder in this arena. Hoover's vision of the associative state inspired the establishment of industry groups like the NAB, which also became major stakeholders in the decision-making process. When the Court gave legal standing to the public in 1966, the public became an officially sanctioned stakeholder too.

This chapter also identified some of the values and assumptions that undergird communication policy decisions. Congress allowed commercial interests to dominate broadcasting, at least partially, because of the fear that a government controlled communications infrastructure might restrict free speech as set forth in the First Amendment. The idea that the structure of broadcasting should provide for an unfettered marketplace of ideas is a theme that emerged before the idea of broadcasting was a reality. Various attempts to achieve diversity on the airwaves by encouraging competition and by mandating restrictions on ownership are documented here. Initially, the corporations that were allowed to control the industry were thought to be the entities that were most capable of achieving nearly universal service. The theory of localism is traced back to the first decisions about how to divide the spectrum. The conflict between these opposing values has never been resolved, even as they have been reinterpreted over time.

By the beginning of the 1990s the communications industry was radically different from the environment that produced the Federal Communications Act of 1934. The spectrum scarcity rationale that was the foundation for regulating broadcasting was increasingly viewed as an anachronism that impeded the growth of a new and improved telecommunications infrastructure. Once again, the discourse of new technology was deployed, this time to the Internet. By the 1990s, most policy makers agreed that a major rewrite of the rules governing the industry was overdue.

CHAPTER 3

CONSUMER INTEREST, CORPORATE COVENIENCE, AND LEGISLATIVE NECESSITY

The 1996 Telecommunications Act was the culmination of the deregulatory trend that began in the 1970s (Aufderheide, 1999; Keller, 2004). The debates leading up to the restructuring of media policy that had been in place for decades continued over several sessions of Congress, and the arguments presented in many of those conferences and hearings are outlined in this chapter. This chapter also suggests that whereas the old rules governing broadcasting had defined the public interest in terms of the needs of citizens in a participatory democracy to access political and cultural information, the new rules defined the public's interest as a "consumer interest" as it related to inexpensive and reliable access to content delivery systems. The premise that new communications technologies could provide an innovative and competitive market that would benefit consumers instead of relying on the inconsistent logic of administrative officials dominated these discussions and is analyzed here. Additionally, this chapter documents the FCC's first attempt to reconcile its media ownership rules with the new legislation in its 1998 Biennial Regulatory Review (FCC, 1998, 2000d).

The Debates

Although little testimony taken from public interest groups during the hearings led up to the passage of the Telecommunications Act of 1996, other more powerful interests had more sway over the legislators (Aufderheide, 1999; McChesney, 1999). Broadcasters were extremely influential in shaping the new legislation, and they wholeheartedly argued in favor of deregulation when it came to the requirements for license renewal and the relaxation of multiple ownership rules (Telecommunications Competition and Deregulations Act, 1995; H. R. Rep. No. 103-225, 1993). However, broadcasters were equally ferocious when arguing that they needed to retain their monopoly of the spectrum (Mundy, 1996, 1998). The existing structure of regulations conferred a public trustee status on broadcasters in exchange for exclusive control over their piece of the electromagnetic spectrum, and broadcasters were loath to give up the privileges associated with the status quo. They argued that broadcasting was a valuable public service and that the only way they could survive in the face of the onslaught from competition from new media delivery systems was if Congress abolished restrictions on multiple ownership and cross-ownership of media properties. In exchange for the relaxation of ownership rules, they vowed to develop the digital capabilities of broadcast television and radio. Since this would require huge capital investments on the part of broadcasters with no guarantee of enhanced revenue, Congress needed to protect their risk. Subsequently, if Congress granted them the exclusive use of additional spectrum space without charge, a valuable public interest would be served. Despite the FCC's long-standing support of procompetition policies, broadcasters once again argued, as they had in the 1920s, that they could not survive without government-sponsored sanctions that protected them from competitors. Notwithstanding all the rhetoric in favor of competition and the free market that congressional representatives espoused during the debates leading up to the Telecommunications Act of 1996, the new policy resulted in less competition for incumbent broadcasters, rather than more.

During the debates leading up to the passage of the Telecommunications Act of 1996, radio station owners argued that their industry was in particularly dire straits and that the only way that they could compete in the new multichannel universe was if ownership restrictions on radio were relaxed (Aufderheide, 1999; Knoll, 1996). Industry representatives also argued that radio advertising was in a slump, and that the only way that the industry could remain financially viable was to remove limits on radio concentration. Congress found this argument persuasive. The act reduced restrictions on national radio station ownership and relaxed local ownership restrictions so one entity could own approximately one half of the radio stations in any one market.

Multisystem cable operators argued that that they too could only thrive if cross-ownership restrictions between cable and broadcasting were abolished (Aufderheide, 1999; Hearn, 2000; Lohr, 1996; Price & Duffy, 1997). They cited competition from direct broadcast satellite services as a threat to their financial viability, and they maintained that price regulations should be abandoned. The Telecommunications Act dropped all rate regulations on cable except for basic service, but the law required cable operators to carry local broadcast signals over their systems. It also allowed telephone companies to compete in the video delivery market.

In a speech before the American Women in Radio and Television, shortly after he was appointed to chair the FCC, Reed Hundt (1994) summarized his views on broadcasting and telecommunications. He emphasized the coming convergence of media and his desire to deregulate the industry in order to further competition in telecommunications. He suggested that the FCC would be open to reexamining broadcast ownership policies.

> As a framework for competition, we have three principles: choice, opportunity, and fairness. Choice means choice for consumers and suppliers. It means you can go to more than one seller for telephone services or cable TV. Fairness means it isn't fair for a single company to charge whatever it wants to monopolize consumers. Opportunity means that competitive markets will create more opportunities to participate in this key part of our economy. (Hundt, p. 2)

In countless speeches, Hundt reiterated his faith that competition and deregulation would best serve the public interest (Hundt, 1995, 1997a, 1997b). However, he was also leery of the dangers of creating an environment that was conducive to monopoly, so he stressed that the FCC should be proactive when it came to correcting the excesses of the market.

Although the Telecommunications Act of 1996 is an extremely complex piece of legislation, it was clearly the desire of legislators to spur the development of an information superhighway that would usher in a new era of technological innovation (S. Rpt. No. 686, 1996). According to Congress, a competitive market unhampered by unnecessary regulations, without barriers to entry, would achieve these goals more readily than the old regulatory regime. If some members of Congress expressed their concern that the act might promote “communications cannibalism,” as Representative Markey did, others were more concerned that the United States would be stranded on the side of the information highway if the telecommunications industry were not allowed to compete in the domestic and global marketplace.

The regulatory regime based on the doctrine of spectrum scarcity that had been in place since the passage of the Federal Communications Act of 1934 was pushed aside during the discussion that led to the passage of the Telecommunications Act of 1996. As Senator Lott put it,

> Most telecommunications policy and regulation in America is based upon the New Deal era Communications Act of 1934. Tight government control over spectrum-based services was justified on a scarcity theory. Neither theory for big government regulation holds true today, if it ever did. (Telecommunications Competition," Cong Rec. S. 7881, 1995 p. 141)

Legislators and members of the FCC argued that while the electromagnetic spectrum was still a limited physical entity, by the end of the 20th century, U.S. citizens had access to a multichannel universe (Aufderheide, 1999; Levi, 2000; Meyerson, 1997; Price & Duffy, 1997; "Telecommunications Competition," Cong Rec. S. 7881, 1995). Cable television was now accessible by a majority of households, the number of broadcast stations had increased considerably since the 1970s, and consumers could access programming via direct broadcast satellite systems, multichannel multipoint distribution systems, and videocassettes. The Internet provided Americans with even more access to information and other programming. Accordingly, legislators argued that while the spectrum remained finite, scarcity was an outmoded principle that was no longer applicable to the contemporary communications environment.

This argument, while logical on its face, neglected at least one important cornerstone of broadcast policy-making. When legislators created the structure of broadcasting in the 1920s, they rejected proposals that would have created a noncommercial government-sponsored system of broadcasting (Barnouw, 1966; McChesney, 1993; Radio Act of 1927; Streeter, 1996). Once Congress allowed broadcasters to create an advertiser-supported, privately controlled system of broadcasting, they explicitly stated that this privilege came with the caveat that broadcasters must serve the public interest, convenience, or necessity (Federal Communications Act of 1934). However, after Congress passed the Telecommunications Act of 1996, they lost sight of the original compromise. By the 1990s, citizens not only had to tolerate an advertiser-driven broadcasting system, but now, their options were also limited by their ability to pay for subscription-based services (McChesney, 1999). When Congress left the public service responsibilities of broadcasters to the dictates of the market, they did not make provisions for correcting the excesses of a system based primarily on the interests of large multinational corporations.

After station owners made the argument that broadcasting was an important public service, Congress agreed. When broadcasters argued that providing digital signals would be a vast improvement for this important public service, Congress allowed broadcasters to increase their dominance over the spectrum so they could offer digital broadcasting. Then, after broadcasters complained that the transition to digital broadcasting would require massive capital investments with no proven revenue-enhancing stream, Congress was sympathetic to their plight. Consequently, broadcasters complained that they were losing viewers due to increased competition from other entrants in the multichannel universe, Congress decided that the only way that broadcasting could remain economically competitive was if station owners were allowed to consolidate their holdings so they could realize the economic efficiencies of large multiple ownership groups.

When Senator Pressler first presented a conference report that proposed a compromise to reconcile differences between the House and Senate version of the legislation that would become the Telecommunications Act of 1996, he stressed his belief that competition in the industry would benefit all stakeholders.

> Competition, not regulation, is the best way to spur innovation and the development of new services. A competitive marketplace is the most efficient way to lower prices and increase value for consumers. More competitive American telecommunications markets will promote United States technological advances, domestic job and investment opportunities, national competitiveness, sustained economic development, and improved quality of American life more effectively than regulation. (Telecommunications Competition and Deregulations Act, 1995, p. 7881)

However, despite rhetoric that endorsed the principle of competition in the marketplace, the Telecommunications Act allowed for greater consolidation in the broadcasting industry (Aufderheide, 1999; McChesney, 1999). Congress raised the cap on the National Television Ownership Rule to 35% of the national audience and eliminated national ownership restrictions for radio altogether. Even if Congress did not appear to be overly concerned about the ramifications of increasing media consolidation, the paradox was that it had given the FCC a mandate to preserve competition.

Competition as the Public Interest

The Telecommunications Act of 1996 contained a clause that required the FCC to review all of its media ownership rules biennially to determine whether any “such rules are necessary in the public interest as the result of competition” (Telecommunications Act, §202(h), 1996). The Commission is also required to “repeal or modify any regulation it determines to be no longer in the public interest.” President Clinton appointed William E. Kennard to chairman of the FCC in November 1997 (“Kennard

Biography," n.d.). Despite having signed the legislation that weakened media ownership rules in May 1996, Clinton had already gone on record as being opposed to the relaxation of duopoly rules by the time he appointed Kennard. Kennard himself was a strong proponent of maintaining existing media ownership regulations (McConnell & Albiniak, 1998; Mundy, 1998). Kennard's appointment did not please the broadcasting industry that was hoping that the deregulatory tide that began with the Telecommunications Act would be soon swing further in their direction. Broadcasters began to pressure the FCC to reexamine the ownership rules. In March 1998, the FCC adopted a Notice of Inquiry that solicited comments from interested parties on six rules that it was required to review, (a) The National Television Ownership Rule and UHF Discount, (b) The Dual Network Rule, (c) The Daily Newspaper/Broadcast Cross-Ownership Rule, (d) The Cable/Broadcast Cross-Ownership Rule, (e) The Experimental Broadcast Station Rule, and (f) The Local Radio Ownership Rules (FCC, 1998).

The commission began its first comprehensive attempt to address media ownership rules in 1998, although before issuing the completed report in 2000, the FCC relaxed the prohibition on common ownership of local television stations with overlapping signal contours (FCC, 1999b). The new rule, known as the "Eight Voices Rule," allowed duopolies in the same designated market area if neither station was ranked among the top four in the market and if after the merger, there would still be at least eight independently owned television stations in the market (FCC, 1999b). In the same rulemaking procedure, the Commission also relaxed the one-to-a-market radio/cross-ownership restriction and allowed radio/television duopolies under certain conditions. A licensee could now control one or two television stations and up to six radio stations in a market where at least 20 independent voices would remain before a merger, or one entity could own up to four radio stations in markets where at least 10 independent voices would remain after a merger or one radio station and one or two television station in a market regardless of how many other independent voices there were in that community.

In the introduction to its 1998 Biennial Regulatory Review Report the Commission reminded readers that it had historically based its regulatory decisions on the principle that competition and diversity serve the public interest and that the Supreme Court most recently in *Turner Broadcasting System v. FCC* (1997) validated this rationale (FCC, 2000d). Furthermore,

> Competition is an important part of the Commission's public interest mandate, because it promotes consumer welfare and the efficient use of resources and is a necessary component of diversity. Diversity of ownership fosters diversity of viewpoints, and thus advances core First Amendment principles. (FCC 2000d, p. 5)

While acknowledging that the media market had changed since the passage of the Telecommunications Act, a majority of the Commissioners were concerned that increasing consolidation across all media could undermine its goal of competition and diversity (FCC, 2000d; Kennard, 1999b). Although all of the major networks were in favor of the repeal of national ownership limits for television, the Commission rejected the argument that the elimination of the caps would not affect the level of diversity and competition in local markets. The Commission was not sympathetic to the network's argument that the cap hindered their ability to accrue economic efficiencies, nor were they susceptible to the argument that group-owned stations produced more news and public affairs programming. Additionally, the Commission was skeptical of the networks' argument that the national advertising market and the national market for video exhibition rights would remain less concentrated if the rule were eliminated.

Instead, the Commission found the arguments of those opposed to the elimination of the national ownership limits to be more convincing (FCC, 2000d). The NAB argued that the 1996 regulations had not been in place long enough to evaluate their effects on local broadcast markets. The National Affiliated Stations Alliance (NASA) argued that changing the national rule would have a detrimental effect on localism by making it more difficult for affiliates to serve their communities. The Center for Media Education (CME) and other public interest groups contended that the 1996 increase in the cap led to unprecedented concentration and diminished competition that could enable networks to exercise monopoly power in the program production market. Additionally, these groups claimed that the public was receiving less news and information from fewer sources than ever before (FCC, 2000d). Others commenters said that the 35% limit was not harming competition and was essential to protecting diversity on the airwaves. The American Federation of Television and Radio Artists (AFTRA) argued that group owners recycled news and public affairs programming from one reporter or news writer, whereas the public interest is better served by having different reporters and news writers in separate markets provide different angles and perspectives on the news.

By the time the FCC published its 1998 Biennial Regulatory Review Report in May 2000, the pattern of ownership within the industry was less stable than it had been in 1996 (FCC, 2000d; Kennard, 1999b). Nowhere was this more apparent than in the radio industry. At the time of the passage of the Telecommunications Act of 1996, radio was the least concentrated and most local of all electronic media (Aufderheide, 1999; FCC, 2000g). Within a year and a half of the passage of the act, more than a quarter of all radio stations nationwide had been sold at least once. In a Notice of Proposed Rulemaking (NPRM) issued before its second biennial review, the FCC reported that before the passage of the Telecommunications Act of 1996, there were approximately 5,100 owners of commercial radio stations nationwide, but as of November 8, 2001, there were only 3,880 radio station owners, a decrease of 25%. The FCC also stated that local markets had seen similar consolidation. In March 1996, a typical Arbitron metro market had an average of 13.5 unique owners; in March 2001, the average was 10.3, a decrease of 22%. The Commission noted that “promoting diversity and competition remains the touchstone of its local radio ownership rules,” and it asked the public to submit comments addressing whether the three traditional aspects of diversity (viewpoint, outlet, and source) should guide its public interest considerations.

Additionally, a 2001 article in *Broadcasting and Cable* reported that the top 25 radio groups controlled 2,710 outlets nationwide, 24.3% of the 11,115 commercial stations across the country (Kerschbaumer, 2001). Among those companies, Clear Channel Communications controlled the most stations nationwide with 1,202 stations. The article also noted that commercial radio station revenue was up approximately 10% over 1999’s total, bringing in $3.5 billion dollars.

In its 1998 Biennial Regulatory Review Report, the Commission decided to retain the local radio ownership rules. In the judgment of the majority, these rules continued to serve the public interest. However, the Commission was concerned that consolidation in local markets had led to adverse effects on local competition. The Report cited statistics that showed that in 85 of the top 270 Arbitron markets, two entities already controlled

80% of all radio advertising revenue, and in 143 markets, two entities controlled upward of 70% of the revenue in a market. This concerned the Commissioners because in their view radio advertising was distinct from other forms of advertising. While CBS and other large group owners urged the FCC to consider all other media when evaluating the level of advertising revenue in local markets, the majority of the Commission insisted that radio advertising was irreplaceable. According to the 1998 Biennial Regulatory Review Report, there was no other medium that could reach a mobile audience, no other medium that was as useful in reaching targeted audiences, and no other advertising vehicle that was as cost effective or capable of adapting so responsively to local market conditions.

The commission was less clear with regard to diversity of viewpoints in local markets and adopted a wait-and-see approach to local ownership rules (FCC, 2000d). However, the commission did note that there were hundreds fewer licensees than there were 4 years before. The Commission conceded that group ownership of radio stations produced economies of scale that gave owners access to more resources to produce more public affairs and news programming. However, the FCC was also receptive to CME’s argument that group owners had actually reduced coverage in this area, and that consolidation in the industry had reduced coverage of unprofitable demographic groups. However, the Commission did give one concession to group broadcasters. They agreed to study whether the methodology that the Commission was using to measure the size of local markets was accurate.

When considering whether to lift the ban on the Newspaper/Broadcast Cross-Ownership Rule in local communities, the Commission once again found that the ban served the public's interest because it furthered the goal of viewpoint diversity (FCC, 2000d). The Commissioners argued that there was no acceptable substitute for newspapers or broadcast stations on a local level. They did not feel that local access stations on cable systems fulfilled this responsibility, especially given that it was up to local municipalities to negotiate the availability of these channels when renewing franchise agreements. The Commissioners reiterated the importance of maintaining viewpoint diversity in local markets. "Monopolization on the means of mass communication in a locality assures the monopolist control of information received by the public and based upon which it makes elective, economic, and other choices" (FCC, 2000d, p.48). Additionally, the Report noted that new outlets such as DBS and MMDS did not typically produce local programming. Even if new video and information delivery options did cover local news and public affairs, not everyone could afford to subscribe to these services, whereas all citizens could access local television programs or pay a nominal fee for a newspaper. The Commission refuted the arguments of the few newspaper/television owners that were grandfathered in before 1975 when they claimed that the economic efficiencies they had reaped because of their exempted status allowed them to produce more news and public affairs programs.

> The Commission has felt that without a diversity of outlets, there would be no real viewpoint diversity—if all programming passed through the same filter, the material and views presented to the public would not be diverse. Similarly, the Commission has felt that without diversity of sources, the variety of views would necessarily be circumscribed. (FCC, 2000d, p. 52)

With regard to competition, the Commissioners noted that the ban on Newspaper/Television Cross-Ownership only prohibited those combinations in local markets and, therefore, newspapers and television stations were free to compete in other markets.

While the Commission acknowledged that existing combinations might have collected increased advertising revenues due to their exemption from the rule, there were no benefits that those economic efficiencies accrued to advertisers or consumers. Since most of the comments received on this issue pointed out that newspaper/television combinations kept separate editorial staffs, the Commission was not convinced that allowing such arrangements would benefit group owners. The Commission applied similar logic when voting to retain the Cable/Broadcast Cross-Ownership Rule. When the Commission first established the ban on cross-ownership between cable systems and television stations, regulators expressed their intent to both increase competition in the marketplace and to increase competition in the marketplace of ideas *(FCC v. National Citizens Committee for Broadcasting*, 1978).

In the 1998 Biennial Regulatory Review Report, the Commission voted to retain this rule because the members felt it was still relevant to the pursuit of competition and diversity. The Commission noted that the cable industry was still highly concentrated and that the rule would foster diversity on a local level. In answer to opponents of this rule, the Commissioners pointed out that although cable and broadcast television might sometime be substitutes for each other, the majority of cable system providers did not produce locally originated news and public affairs programs. Even if one wished to allow public access channel programs into the mix, system operators had no control over those productions. The Commission felt that cable/broadcast combinations would erode the number of independent television stations that had just begun to adapt to the relaxation of local television ownership restrictions recently allowed by the FCC.

ABC, CBS, Paxson, and WB were the only parties to comment on the Dual Network Rule and they were all in favor of its repeal (FCC, 2000). The rule permitted a person or entity to affiliate with a network that maintained more than one network as long as the network was not created through the merger of ABC, CBS, NBC, FOX, WB, or UPN. The purpose of the rule was to encourage common ownership of multiple broadcast networks created through internal growth and new entrants to the market. The rule was also designed to prevent mergers with the major existing networks unless a merger was created with another network formed after 1996. The networks argued that they were in poor economic health because they were losing viewers to cable and satellite competitors. The networks maintained that they were being discriminated against because mergers are allowed between broadcast networks and cable networks, but the rules limiting mergers among television networks still stood. The Commission refuted this argument by saying that there was nothing to prevent the networks from owning multiple networks, and there were no restrictions on the number of stations that could affiliate with a network. However, the Commission did agree to consider modifying the rule to allow mergers with UPN and WB and stated that it would seek comments with a NPRM.

Only one comment was filed from NAB regarding the possible repeal of the limit of one experimental station to a licensee (FCC, 2000d). The Commission decided to issue a NPRM to allow broadcasters to operate more than one experimental station at a time since experimental stations had no effect on either competition or diversity. Since these stations were not operated as commercial ventures and rules already existed to safeguard their operation, the FCC modified the rule.

In a separate statement attached to the report, Kennard (2000) explained that although Americans did have more communication options than ever before, the majority of households still received most of their news and public affairs programming over broadcast television. In fact, he cited statistics that said that the average American spent 7 hours a day watching television and only spent 8 hours a month online. Kennard addressed those who would argue that the substantial increase of options for consumers outweighed the growth of consolidation in the television and video industries. He went on to state that in his opinion, more choice does not necessarily equal more competition in viewpoints. Kennard said that just because there may be more pipes delivering content to a given household, if all pipes are owned by a single corporation all the channels in the world could not guarantee that the information received would come from diverse and antagonistic sources.

In his dissenting statement, Commission Harold Furchtgott-Roth (2000) dismissed Kennard's argument for opposing the elimination of the National Television Ownership Rule by saying that the national limits had no effect on local markets. Furchtgott-Roth contended that by taking a wait and see approach to the rules, the Commission was in effect ignoring its regulatory responsibility. He also suggested that past precedents should have no influence over how the Commission chose to interpret the Telecommunications Act of 1996.

Commissioner Michael Powell (2000) argued that the structure of the broadcasting market had changed so radically since the original rules were formulated that they were no longer applicable. He maintained that since there were more broadcast networks, more broadcast stations, and more video outlets with more programming options for consumers than before the Telecommunications Act was passed, therefore, the FCC should let the market determine the structure of broadcasting instead of regulating by fiat. Powell stated that he could see no possible connection between national ownership limits and preserving competition and diversity on a local level. He also argued that the Commission's review did not adequately address any harm that could be caused by limiting the percentage of the national audience that one entity could reach. He said that the national ownership cap limited economies of scale for group owners and therefore reduced incentives for investments in broadcasting, thus limiting expansion opportunities for corporations. Powell said that the caps reduced the ability of networks to own stations, consequently raising the costs of producing high quality, innovative programming. Additionally, Powell questioned the goal of ensuring access to diverse and antagonist sources. His point was that broadcasters depended on capturing the largest audiences and therefore it was against their best interests to alienate viewers by antagonizing any one group of viewers.

Powell (2000) also dissented from the majority's decision to retain restrictions on the Newspaper/Broadcast Cross-Ownership Rule, although he was encouraged by the Commission's decision to discuss if the rule could be modified in specific circumstances. Powell argued that the Commission's rationale for maintaining this rule was flawed because it depended on the assumption that local television stations provide the bulk of local programming. He stated that this technical limitation would surely change in the near future. Powell said that many cable system providers already offered coverage of sports and other local events and would expand their coverage if there were an audience for them. He also objected to maintaining the Broadcast/Cable restriction on the same grounds. Powell concurred with the majority opinion that local radio ownership rules should be maintained but disagreed with the decision to issue a NPRM to consider if consolidation in the industry had threatened local competition and diversity. Powell supported efforts to redefine the geographical boundaries of local markets if the FCC could adopt a better tool for measuring the size of markets.

The Staff Biennial Review

After President Bush was elected in 2000, he appointed Michael Powell to Chair the FCC. However, before Kennard left office, he released a second biennial report (FCC 2000a). The 2000 review did not change any of the media ownership rules, but it did announce the Commission's intention to issue a NPRM to solicit comments about the possible modification of the Newspaper/Broadcast Cross-Ownership Rule in the future (FCC 2000a; FCC, 2000b). The major initiative contained in the report was an effort to evaluate every rule in every bureau and office, not just those explicitly covered under the biennial review section of the Telecommunications Act. Therefore, the scope of the review process was more comprehensive than the first, and the Commissioners were requiring more thorough documentation from the staff. The goal of this initiative was to create a more consistent methodology for future reviews and set forth a framework for future action. However, before the 2000 Biennial Regulatory Review Report was adopted, broadcasters went to court to challenge the Commission's rulings in the 1998 Biennial Review. At issue was the validity of the FCC's Cable/Broadcast Cross-Ownership Rule, the National Television Ownership Rule, and the Local Television Duopoly Rule (*Fox v. FCC*, 2002; *Sinclair v. FCC*. 2002). These two court cases, combined with the change in leadership at the Commission, were the pivotal moments that led to Powell's attempt to further deregulate media ownership rules.

Summary

When legislators passed the Telecommunications Act of 1996, they rejected the spectrum scarcity rationale that had provided the justification for the regulation of broadcasting since the Radio Act of 1927. Since broadcasters no longer had a monopoly on the distribution of video and audio content, lawmakers reasoned that broadcasters should be permitted to consolidate their holdings in order to achieve the economic efficiencies that would allow the continued viability of the service. Thus, legislators assumed that the public interest would be served with increased access to new means of information distribution. As one of the primary stakeholders in the policy-making process, Congress elevated market force pragmatism over other core values of regulatory policy. Competition became the means in which legislators assumed that localism, diversity, a marketplace of ideas, and the First Amendment rights of the public to receive information would all be achieved.

By statute, the FCC was required to review and adapt its media ownership policies biennially. However, after the Telecommunications Act of 1996, the broadcast industry became less competitive and more consolidated. FCC Chairman William Kennard did not subscribe to the belief that competition across all media sectors served the public interest in broadcasting exclusively. Kennard believed that safeguards were necessary to ensure that all of the core values of broadcasting policy would be upheld.

The division between the Commissioners can be attributed to a larger conflict over the purpose of the regulatory body. Powell represented the perspective that the proper role of the FCC was to ensure the economic health of the broadcasting industry so that individual licensees and corporate owners could achieve a competitive position in the consumer and advertising market (Powell, 2000). Only then would the industry be capable of serving the public interest. The Democratic majority viewed their responsibilities differently. Their vision of media was that its primary function was to transmit information in a democratic society. While Furchtgott-Roth (2000) and Powell (2000) thought that restrictions on broadcast ownership were misguided, or as Powell suggested, even harmful, Kennard (2000), Ness (2000), and Tristiani (2000a), believed that the same restrictions would preserve a diverse and antagonistic marketplace of ideas, one of the primary functions of the media in a democracy. As long as the Democrats maintained their majority on the Commission, the media ownership restrictions would remain in place, but once the membership of the Commission shifted and the Republicans assumed control of the White House, the balance of power would change and the conflict over media ownership was certain to become more intense.

During his years as a Commissioner, Powell repeatedly asserted that the deregulation of media ownership rules would promote competition and thereby benefit individual consumers by providing them with cheaper and more innovative services. He rarely spoke of the function of media in a democracy; rather he was fond of speaking of the wonders of new communications technologies as if the technology was an end on to itself, rather than the means to achieve a more informed and participative citizenry in a self-governing democracy.

Several important events defined the agenda for the FCC in 2001, but none were more significant than the changes in the political make-up of the Commission, and the looming threat of legal challenges to the agency's conclusions contained in the 1998 Biennial Regulatory Review Report. When President Clinton appointed Commissioner Michael K. Powell to the FCC in November 1997, he was one of two Republican appointees. By the time President Bush appointed him to head the Commission in January 2001, Powell would preside over a Republican majority at the FCC for the first time in 8 years ("Powell Biography," 2007; Pulley, 2002). That same year, Republicans controlled the House of Representatives, the Senate, and the White House, and broadcasters felt the political tide was turning in their favor. Although the two cases broadcasters brought challenging the decisions made in the first biennial review, *Fox v. FCC* and *Sinclair v. FCC*, would not be decided until the beginning of the following year, the D.C. District Court remanded the issue of national caps on cable system operators back to the FCC (*Time Warner v. U.S.A.*, 2000). Consequently, Powell, a steadfast opponent of media ownership restrictions, prepared to conduct the most sweeping reform of those policies in decades

CHAPTER 4

ECONOMIC EMPIRICISM: THE LONE RATIONALE

When Michael K. Powell assumed his position as chair of the FCC, he brought with him a regulatory stance that was diametrically opposed to that of his predecessor's. Whereas Kennard supported retaining media ownership limits, Powell was in favor of their elimination. He was also determined to produce a biennial review that would not be rejected by the courts. Powell had never been shy about speaking his belief that the invisible hand of the market was the best way to regulate media, and he had no compunction about expressing this belief once he assumed his position as chair. During his 1st year in office, three new appointees joined the Commission, the Senate held hearings on media ownership regulations, and the FCC attempted to defend two important cases that were challenged in court after Kennard produced the 1998 Biennial Regulatory Review Report. Additionally, in 2001, Powell created a Media Ownership Working Group (MOWG) to provide the evidence needed either to support or relax the six rules in question. In November, Powell asked several prominent attorneys and academics to participate in a media ownership roundtable so that they could offer their expertise to the new working group.

The Commissioners

Powell grew up as a quintessential army brat, following his father General Collin Powell from post to post (“ Biography of Powell,” n.d.; Pulley, 2002). He joined the Army as a junior officer after college, but during his tour of duty, Powell was injured in an accident that damaged his spine and fractured his pelvis. The accident effectively ended his military career. After recuperating for more than a year, he served as a policy advisor to Secretary of Defense Richard Cheney. Soon after, Powell decided to pursue a law career and earned his JD from Georgetown University in 1993, and he clerked for the Chief Justice of the United States Court of Appeals in the District of Columbia. Powell worked briefly for the Washington, DC law firm of O’Melveny & Myers and then took a job at the Antitrust Division at the Department of Justice. His duties there included advising the Assistant Attorney General on antitrust matters, policy development, criminal and civil investigations, and mergers. Considered to be an up and coming conservative with a stellar pedigree backed by Senator John McCain and Representative Billy Tauzin, he was appointed to the FCC by President Clinton to serve on the Commission in November 1997.

Most press accounts of Powell gave him a great deal of credit for his intellectual abilities and his desire to reform an agency that has often been called moribund (Beckerman, 2003; Fallows, 2003; Pulley, 2002). Others noted that he was personally engaging and affable. Early in his administration, he was often depicted as a future political candidate, a possibility that he did not rule out. However, his critics accused him of being remote and imperious and of closely guarding the information gathered by the agency (Hearn, 2002; McConnell, 2003a). Others complained that Powell was obsessed with details and determined that no rules be vacated under his watch. All agreed that Powell could be both witty and sarcastic.

In a widely quoted speech given before the American Bar Association's Legal Forum on Communication Law in Las Vegas, Powell told his audience that he had undergone a considerable amount of soul-searching in his quest to explicate just exactly what the public interest standard really meant (1998). He studied the transcripts of the Congressional debates over the Radio Act of 1927 and found the discussions of the public interest standard to be vague and confusing. He studied Supreme Court decisions on the subject, and became frustrated because both Justice Frankfurter and Harvard Law School Dean James Landis had concluded that vague standards administered by enlightened wise men were the best strategy for an administrative agency to take. After reading the "scriptures" of Landis and Frankfurter, he said,

> I expected some sort of revelation, for I did not feel particularly enlightened after being confirmed by the Senate. The night after I was sworn in, I waited for a visit from the angel of the public interest. I waited all night. But she did not come. And in fact, five months into this job, I still have had no divine awakening and no one has issued me my public interest crystal ball. (Powell, 1998, p. 2)

After the FCC passed rules in 2003 relaxing media ownership restrictions, 15 women dressed in pink wings embroidered with the words "Free Speech" protested the ruling by dancing around in front of the glass doors of the FCC building. They chanted to the beat of bongos and unfurled a scroll listing their demands. Apparently, the angels of the public interest finally made their presence known (Beckerman, 2003).

Despite possessing a good sense of humor, Powell was deadly serious about his belief that the market was the best way to regulate the media (Shadid, 2001). Just 3 months after being elevated to his post, Powell met with telecommunications industry representatives and told them that the government should rely less on the law and more on the market to direct the course of the industry (Powell 2001c). According to Powell, the market must be the pinnacle of any government policy or philosophy, and the public interest would be served by letting the market do its magic. Less than a week later, Powell approved the sale of 64 radio stations that had been on hold (Powell, 2001b; Stern, 2001). This was a reversal of Kennard’s policy of delaying the sales out of concern that large broadcast companies would gain too much control over local markets. The sales had been pending for more than 2 years, and Powell declared that the public interest was not being served by inaction on the part of the agency. The approval allowed Clear Channel Communications, owner of more than 1200 stations nationwide, to add an additional 16 stations and allowed Cumulous Media Corporation to increase its holdings by 21 outlets, up from 227.

Powell described his perspective as a regulator in an interview with Sam Donaldson at the NAB convention in 2001 (2001b). Again, he espoused his faith in a free market and spoke passionately about the future of digital technology. When Donaldson asked Powell about his views on the 35% limit for reaching national television audiences, Powell was quick to reply that he had not made up his mind, but he said he was skeptical of any prophylactic prohibitions on ownership or reach. He explained that the FCC has never been able to objectively measure the effects of diversity of ownership, and that he was only interested in consumer’s *perception* of diversity, not some arbitrary limits set forth by his agency. He said it was impossible to determine what the market dynamics of television and radio would be if the cap were lifted. Additionally, Powell said that he was uncomfortable with the First Amendment implications of retaining the national ownership limits. According to Powell, the limits were a violation of a broadcaster's right to speak to 65% of the American audience that the caps barred them from reaching. He also discussed his discomfort with the difference between First Amendment standards for broadcasting and the strict scrutiny tests that applied to other forms of speech.

At another conference before telecommunications industry representatives, Powell summed up his regulatory philosophy.

> I think that the Commission recognizes that it has a duty and an obligation to reevaluate and revalidate or get rid of rules that are artificial or structural constraints on growth. It has at times employed these kinds of mechanisms for the facilitation of competitive markets in their infancy. But, as those conditions change and markets become more competitive, I think the government has a duty and an obligation to reevaluate whether the rule continues to serve its purpose. (2001c, p.5)

In March, the Washington, DC Court of Appeals remanded the *Time Warner II* case challenging the national ownership limit on cable system ownership back to the FCC for further consideration (*Time Warner II. v. FCC*, 2000). The court ruled that the FCC had failed to provide adequate justification for imposing horizontal limits on multiple cable system operators. The ruling also rejected the FCC's contention that it had the authority to impose limits based on its public interest obligation to ensure that media was diversified both locally and nationally. The decision rejected this reasoning and stated that the FCC had no statutory authority to promote diversity. According to Powell's interpretation of the ruling, the Court was ordering the FCC to provide empirical data to support its rulemaking procedures instead of relying on vague and qualitative notions of public service. As Powell saw it, the Telecommunications Act of 1996 required the FCC to fully justify retaining media ownership regulations with quantifiable data or to do away with the rules altogether. The angels of the public interest were not relevant to the discussion.

Powell devoted the first several months of his tenure to reforming the organizational structure of the FCC. In an effort to cross-pollinate the expertise of the agency, he shifted over 500 workers to other divisions and bureaus within the FCC ("In his own words," 2002; Pulley, 2002). Powell also created the "FCC University" as an attempt to update his workforce's knowledge of new technology and economic issues. His goal was to streamline the agency and make it more efficient, but despite his deregulatory rhetoric, many industry officials complained that he was moving too slowly for their tastes. However, he put off any major initiatives until the new Commissioners could come onboard (Labaton, 2002c). The terms of Commissioners Susan Ness and Harold Furchtgott-Roth were set to expire in May, and Commissioner Gloria Tristani announced that she would resign before the end of the year (Tristani, 2001b).

President Bush nominated Kathleen Abernathy to replace Furchtgott-Roth, and Congress confirmed her on May 31. Abernathy was a Washington insider and a deregulatory-minded Republican (Carlson, 2001; Whitney, 2002). After graduating from law school, Abernathy worked at the FCC for 2 years as a legal advisor to former Commissioners James Quello and Sherrie P. Marshall. After leaving the FCC, she worked in private industry, as vice president of AirTouch Communications, as a partner in the Washington, DC law firm of Wilkinson, Barker, Knauer, and as vice president for public policy at BroadBand Communications, a lobbying position that she held at the time of her appointment ("Biography of Abernathy," n.d.). An article in *Mediaweek* reported that telecommunications lobbyists considered Abernathy to be the guaranteed third vote for Republican Chairman Powell (Mundy, 2001). In an interview with *Cableworld* Abernathy spelled out her regulatory philosophy.

Abernathy said regulators should be like fans on the sidelines when the market is operating competitively (Mundy, 2001). She said that regulators should be mediators or facilitators to interparty negotiations and that regulators should collect data quickly in order to return the situation back to market forces in a manner as timely as possible. Accordingly, only as a last resort should regulators act to prevent harm to consumers and competitors.

In August, Commissioner Abernathy submitted an article to *The Point*, The United States International Telecommunications Union Association's newsletter, and offered her perspective on her role as a Commissioner (2001b). Foremost, she said it was the responsibility of the Commission to complete its statutory mandates effectively and on time. Abernathy emphasized her belief that the FCC should strive to act within its "core competencies: as an advocate for, and as an expert regarding, commercial communications interests" (2001b, p.1). She said her second principle was very straightforward.

> I trust functioning markets more than I trust regulation. Domestically, to the extent that Congress gives the FCC discretion to act in a given context, the Commission should only intervene when there is clear and substantial evidence of market failure. A fully functioning market is far better at disciplining wayward competitors than a regulator ever can or will be. (2001b, p.1)

Abernathy said that the FCC has a responsibility to respond promptly to requests from industry for action and to craft clear and concise regulations that are enforced vigorously. Abernathy's views of her role as a Commissioner were not dissimilar to Powell's. She believed that the market could best serve to regulate the telecommunications industry, she believed that the Commission must be strongly responsive to the industry, and she believed that the FCC must be proactive when collecting data so that regulators could adapt quickly and efficiently to dynamic changes in the market. It was not at all that surprising that telecommunications lobbyists considered her to be the guaranteed third vote on the Commission. There was even speculation that she might one day head the agency.

Kevin Martin was appointed by President Bush to fill the seat left vacant by Powell ("Biography of Martin," n. d.). Although Congress confirmed him, Abernathy, and Copps at the end of May, he was not sworn in until July 3 because of an administrative snafu (McConnell, 2001a). If Abernathy was a Washington insider, Martin had a direct line to the White House. Before his nomination, Martin was a special assistant to the President on economic policy and was on the staff of the National Economic Council. At the time of his appointment, his wife Catherine was Vice President Cheney's chief public affairs officer (Davidson, 2003b; Murray, 2003). From 1997 to 1999, Martin served as a legal adviser to FCC Commissioner Harold Furchtgott-Roth, and he served in the Office of Independent Counsel during Kenneth Starr's Whitewater investigation. Martin also worked for several years at the influential law firm of Wiley, Rein, & Fielding. However, perhaps the most notable aspect of Martin's resume was that he had put his career on hold in 1999 and worked for George Bush's election campaign until December 2000. During the postelection recounts, he could often be seen on television examining chads for the cameras (Carlson, 2001; Mundy, 2001). Widely considered to be President Bush's handpicked nominee, Martin was expected to uphold the administration's stance on deregulation. One friend of Martin predicted that he would bring a free market orientation and deregulatory mindset to the Commission, but he also added that Martin was very open-minded and would take each issue into consideration on its merits (Alleven, 2001). In early speeches, Martin expressed his dissatisfaction with the Newspaper/Broadcast Cross-Ownership Rule and said that the media environment had changed drastically since the FCC previously examined the regulation (2002; Shields, 2002a). Martin stated that he thought it was inconsistent to count voices in any given market differently, depending on which medium the agency was assessing. He expressed his view that consumers had many more video and information delivery systems than ever before, and he did not think that banning newspapers from owning broadcast properties was in the public interest. In Martin’s view, this needlessly prohibited new entrants to the overall communications market. Martin’s area of expertise was in the telecommunications sector, and he directed most of his public comments to those issues in the early part of his term. His procompetitive, deregulatory approach brought him in line with Powell.

Michael J. Copps, however, was another story altogether. Copps was nominated by President Bush to fill the Democratic seat vacated by Susan Ness (“ Biography of Copps,” n.d.; Munroe, 2001). After earning a PhD in history, Copps moved to Washington, DC in 1970 and worked for Senator Fritz Hollings (then Democratic Chair of the Commerce, Space, and Transportation Committee which has oversight over the FCC) as his administrative assistant and Chief of Staff for over a dozen years. From 1998 until January 2001, Copps served as Assistant Secretary of Commerce in the Clinton Administration and worked as deputy assistant secretary for Basic Industries from 1993 to 1998. Before that, he was a director of Governmental Affairs for the Collins and Aikman Corporation, a major automotive supply company.

Copps, a Democrat, had a different view of what his responsibilities were as a Commissioner (Hearn, 2001; McConnell, 2001b). Whereas Powell was still waiting for the angel of public interest to appear and had referred to the public interest as an "empty vessel" that was too ambiguous to have any influence on regulations, Copps was a passionate defender of his interpretation of the public interest. In a characteristic speech before the United States Conference of Catholic Bishops, Copps denounced the prevalence of indecent programming on television and cable.

> Congress made protecting the public interest the foundation of the FCC's responsibility. The concept permeates the communication statutes. Indeed, a quick review of the Communications Act shows that the term "public interest" appears 112 times. To me, 112 times translate into "mandate." (2002d, p.1)

Copps said that even if the public interest mandate was elusive, which he did not believe it was, it was the FCC's duty to uphold it, whether it could be quantified or not. He told his audience that television, radio, the Internet, cable services, and telephone networks are among the most powerful tools in the world. When they are used properly they can enlighten minds, convey powerful ideas, educate, and lay the foundation for economic and human development. He said that his job as a Commissioner was to make sure that the best of communications technologies flourish, but he also said he could not do his job unless nontraditional stakeholders got involved with the issues. Copps insisted that all citizens had a stake in the communications network and that the Commissioners needed to hear the opinions of all its citizens, not just the corporations who owned networks or other business interests in the industry. Although Copps said that the needs of media corporations were important to consider, he thought the public interest mandate demanded that equal attention be paid to citizens.

This was a theme that he would return to time and time again. Copps was a crusader for public involvement, and when the subject of media consolidation and ownership came up for review, Copps encouraged the public to participate in the decision-making process (Copps, 2002a). He was perhaps the most publicly minded Commissioner since former Commissioner Nicholas Johnson had captured attention in the 1960s.

Senate Hearings

In July 2001 Senate Commerce Committee Chair Senator Fritz Hollings, Senator Bryon Dorgan, and Senator Daniel Inouye introduced a bill that would have limited the FCC's ability to lift media ownership rules ("No Title," 2001).

The bill required the FCC to review any transactions that would create cross-ownership conflicts at the time of the deal, rather than waiting until the license came up for renewal as had been the previous policy. The bill required the FCC to report to Congress if it planned on making any changes in media ownership regulations, and how those amendments might affect the public interest. Once the FCC's report was filed, the agency would not be able to make any official revisions for 18 months. The Commerce Committee held a hearing on July 25 to discuss the bill and the FCC's cross-ownership policies, along with the National Television Ownership Limit.

The senators were concerned about increasing consolidation in the industry. Hollings opened the hearing with a quote from Powell who said, "I start with the proposition that the rules are no longer necessary and demand that the Commission justify their continued validity" ("No Title," 2001, p.2). Then, Hollings launched into a speech about the public interest responsibilities of broadcasters and the importance of localism, diversity, and competition in the American broadcast system. Senator John McCain countered Hollings' arguments by saying that the existing limits on media ownership were created 30 years ago and that they were therefore anachronistic in the face of the current multichannel media environment. McCain was troubled that corporations were barred from seeking economic efficiencies based on economies of scale, despite the increased competition for audiences and advertising dollars across the telecommunications industry. Senator Inouye remarked that the last time he heard, all four networks were turning a profit. Later in the hearing, Mel Karmizan, president and CEO of Viacom, testified that if the 35% cap on national television ownership were not lifted, the health of broadcast television would be in jeopardy. Hollings responded with a quote from a CBS quality report that said the network achieved double digit revenue growth in primetime with increased ratings and pricing in the first quarter of 2001. Hollings also read from a May 28 edition of *Broadcasting & Cable* that reported that in 2000, CBS enjoyed $200 million in profits, with its networked-owned stations earning $775 million. Its production and syndication business earned another $450 million. Hollings offered his opinion that he did not see why CBS and Viacom needed relief from ownership caps when they were clearly earning healthy profits.

Alan Frank, CEO of Post-Newsweek stations and chair of NASA, testified that maintaining existing ownership caps was the only way to preserve localism and diversity in media ("No Title," 2001). He also argued that preserving the independence of affiliate stations was in the public interest. Jack Fuller, president of Tribune Publishing Company, argued that the Newspaper/Broadcast Cross-Ownership Rule prevented his company from competing efficiently in the marketplace. He contended that having the combined resources of a newspaper staff and broadcasting staff created a stronger news package that could offer local audiences and readers more in-depth news. Although the FCC's ownership restrictions had always been aimed at more comprehensive goals than the Justice Department's antitrust regulations, Fuller claimed that antitrust regulations were sufficient to govern media consolidation as well. This was a sentiment that was frequently endorsed by Powell (Lehmann, 2002; Powell, 2001c).

Gene Kimmelman, co-director of the Consumers Union, told the Committee that talking about the growth in the number of outlets in broadcasting was deceiving ("No Title," 2001). While the number of stations had risen over the past 30 years, he said that the actual number of owners had decreased considerably. He argued that despite the competition from cable, the nightly network news broadcasts still drew 25 million viewers each night, in contrast to all other cable news shows that only garnered 3 million viewers combined. He also pointed out that AOL-Time Warner controlled about a third of the total number of hits on the Internet and that newspapers were monopolies in 98% of the communities that they served. Kimmelman said that the top four broadcast networks and the largest cable system providers controlled the most popular cable stations. He argued that there was little competition in media, just competition in market segments that are adjacent to each other. Kimmelman said that any proposed changes to ownership rules must meet public interest goals of competition, diversity of ownership, and local community needs. He added that the FCC had never done a careful analysis of these issues. He pointed out that empirical research did not support the view that the marketplace itself, at least in the past, provided for diversity of ownership or meeting local needs. Eli M. Noam, an economist with Columbia Business School, testified that concentration problems were clustered locally, and if one looked at the overall history of concentration across all sectors of the Telecommunications industry, concentration had remained steady over the years.

Although the arguments presented before the Senate Committee were not new, the fact that the hearing was held at all represented the misgivings that many senators had about the increasing pace of media consolidation. Some senators recognized that the media business was unlike other businesses, in that the media transmit culture and make it possible for a participatory democracy to exist. Still, all who attended the hearing understood clearly enough that a commercially based system of broadcasting depended on the ability of corporations to make a profit. Large newspaper corporations and network representatives made the case that ownership limits impeded their ability to generate revenue and insisted that if one considered the entire array of information delivery systems, competitive conditions existed in the industry. Additionally, they argued that their individual segments of the industry would not be able to survive if they were not granted the right to grow their industries through consolidation. Furthermore, they maintained that combining their resources enabled them to produce better products. These issues certainly were not resolved during the hearing, but the senators' concerns about the state of the media would not dissipate in the immediate future.

The Fox/Chris-Craft Merger

Less than a week after the hearing, the FCC had the opportunity to weigh in on some of these issues when it approved a merger between Fox Television Stations and Chris-Craft (FCC, 2001c; Powell, 2001a). Fox had purchased 10 television stations from Chris-Craft and the transaction put Fox over the national ownership cap and also violated duopoly rules in Salt Lake City, New York City, Los Angeles, and Phoenix. Additionally, the merger breached the Newspaper/Broadcast Cross-Ownership Rule by adding another television station in New York City, even though Fox had received a waiver in 1995 after purchasing the *New York Post* while also owning television station WNYW. Furthermore, Section 310(b) of the Federal Communications Act prohibited a corporation that is more than 25% foreign-owned from holding a broadcast license unless the FCC determined that it would be in the public interest. The three Republican Commissioners approved the merger with a conditional waiver that gave Fox up to 24 months to come into compliance with the rules. The order was issued with separate statements from Powell and Abernathy and with dissenting statements from Copps and Tristani (FCC, 2001b). Clearly, this was a contentious issue among the Commissioners.

According to Powell, the approval served the public interest. He pointed out that it was only reasonable to allow Fox a temporary waiver to allow the corporation a reasonable amount of time to divest some of its holdings in order to come into compliance with the FCC's rules (FCC, 2001b). Powell insisted that the duopolies created by the merger and the cross-ownership situation in New York City would only cause temporary harm that would not substantially impair the public interest. He added that he found it "fantastic that the minority would characterize these divesture periods as deviations from our rules in order to approve the transaction" (FCC, 2001b, p. 3). Responding to Commissioner Tristani's assertion that the decision showed the lengths that the Commission would go to avoid standing in the way of media mergers, he said, "This sweeping assertion is not only offensive, but absurd" (FCC, 2001b, p.4)

Although Gloria Tristani resigned from the Commission in September to run for a senate seat in New Mexico, before she moved on she offered a scathing dissent from the Commission's decision to grant the waiver (2001a; Saxe, 2001). Tristani said that the transfer of these television station licenses violated the Federal Communications Act and raised serious concerns regarding the ongoing concentration in the ownership of television stations and other media. Tristani objected to approving the merger based on promises of future compliance with the rules even though Fox offered no public interest showing in its application. Although Fox Television Stations created a holding company to get around the foreign ownership restrictions, Tristani asserted that Fox, for all practical purposes, was in control of the Chris-Craft stations. She closed her dissent by saying that the Fox/Chris-Craft decision

> ...confirmed that the Commission would no longer give meaningful consideration to the public interest when considering the transfer of broadcast licenses and that the decision represented another unwarranted reduction in viewpoint diversity and the marketplace of ideas. (Tristani, 2001a, p.26)

Abernathy argued that the decision balanced the business needs of Fox while enforcing the FCC's rules (2001a). She did not feel that it was appropriate to force Fox to restructure its business prior to obtaining governmental approval for the deal, and she said that the organization of Fox's holding company Newco was consistent with the cross-ownership waiver that the FCC granted Fox in 1995 when it purchased the *New York Post*. Abernathy said that in the face of the size and scope of marketplace demands, the FCC had an obligation to move approvals forward quickly. What was good for Fox was good for the public interest.

Copps took a more conciliatory tone than that of Tristani in his dissent, but he was equally emphatic that the ruling was opposed to the public interest.

> In approving this transfer, the Commission is granting waivers to three different ownership rules. Certain of these are long-term waivers that appear to be based on the anticipation that prior to the termination of the waivers, the rules may be relaxed so that compliance need *never* to occur. Sound decisions should not be premised upon subjective conjecture about how future actions by the courts, Congress, or the Commission, may change the law or alter the rules under which we are instructed to operate. (2001, p. 29)

He added that the decision did not even consider how the public interest benefits that might accrue from the transfer could counterbalance the granting of waivers. He assured the other members of the Commission that he took his public service obligations seriously and that those responsibilities would continue to be a critical determination in any decision he would make on the Commission.

In its news release reporting the Fox/Chris-Craft merger approval, the FCC acknowledged that the deal put Fox in violation of several of the Commission's own rules, but it also stated the terms of the waiver (FCC, 2001c). The Commission gave Fox 6 months to divest itself of one of the two Salt Lake City television stations and gave Fox 12 months to comply with the 35% national ownership limit. However, it suspended that order pending the outcome the final disposition of a court case challenging the rule. The FCC gave Fox 24 months to get in compliance with the Newspaper/Broadcast Cross-Ownership Rule in New York City.

Two months later, the FCC issued an order and NPRM in the matter of cross-ownership of broadcast stations and newspapers and of the Newspaper/Radio Cross-Ownership Waiver Policy (FCC, 2001d). It seemed that Copps' speculation that granting a temporary waiver for the Fox/Chris-Craft merger in anticipation of future rule changes was prescient. The NPRM stated that the Commission was obligated to give recognition to the changes in the marketplace and see to it that its rules adequately reflect the current situation. Therefore, the Commission asked for comments regarding whether changes in the media environment had rendered the regulations obsolete. The deadline for submitting comments was December 3, and the deadline for replying to comments was the first week in January.

Fox v. FCC Argued

On September 7, 2001, the United States Court of Appeals for the District of Columbia agreed to hear *Fox Television Stations, Inc. v. Federal Communications Commission* (*Fox v. FCC*, 2002). The case consolidated five petitions before the court from Fox, NBC, Viacom, and CBS, challenging the National Television Station Ownership Rule. The lawsuit also included Viacom and Time Warner's challenge to the Cable/Broadcast Cross-Ownership provisions. The United Church of Christ (UCC), the NAB, the Consumer Federation of America (CFA), and NASA filed briefs in support of the FCC.

The petitioners challenged these rules based on their contention that the regulations violated the Administrative Procedure Act (APA), the Telecommunications Act of 1996, and the First Amendment (*Fox v. FCC*, 2002). The APA states that a decision rendered by a regulatory agency is arbitrary and capricious if the agency fails to consider important aspects of the problem it seeks to solve. The challenge was also based on §202(h) of the Telecommunications Act that required the FCC to review all of its ownership rules biennially to determine if they still upheld the public interest as a result of competition. The networks argued that the FCC failed to address the issue of whether the 35% limit on national television ownership was still valid, and therefore the FCC had violated §202(h). The networks also claimed that their First Amendment rights were violated by the limits because it prevented them from reaching 65% of the potential viewing audience. The networks also contended that the scarcity rationale, upheld in *NBC v. U.S.* and *Red Lion v. FCC*, was no longer applicable in the current media environment. Furthermore, even if scarcity did exist, the networks argued that the National Television Station Ownership Rule did nothing to mitigate the situation.

Attorneys for the FCC gave three primary reasons for retaining the national limit (*Fox v. FCC*, 2002). First, they argued that it was important to retain the rule, at least for the time being, until they had enough time to observe the effects the recent relaxation of local television ownership rules. Following that same line of reasoning, the FCC also argued that it needed more time to observe the effects of the increase in the national ownership cap from 25% to 35%. The agency also argued that the national limit was needed to preserve the power of affiliates in bargaining with the networks. Time Warner also challenged the Cable/Broadcast Cross-Ownership Rule on the grounds that the rule was both arbitrary and capricious and contrary to §202(h) of the Telecommunications Act. Additionally, Time Warner asserted that the cable limits abridged its First Amendment right to speak. Attorneys for the FCC argued that retaining the Cable/Broadcast Cross-Ownership Rule was necessary in order to prevent cable operators from favoring their own stations and from discriminating against stations owned by others. The Commission also argued that Cable/Broadcast Cross-Ownership Rule was necessary to further the goal of diversity at the local level. Accordingly, the rule contributed to diversity of viewpoints in local markets by preserving the voices of independent broadcast stations, which provide local news and public affairs programming.

Although it was sometimes impossible for the various interested players to find common ground when discussing the issue of media ownership and consolidation, the one thing that the industry, public interest groups, the courts, and Congress could agree on was the need for more reliable data from the Commission. If Powell was determined to modify the FCC's ownership rules, he would have to be able to demonstrate that the Commission's decisions were not arbitrary or capricious. One way to do that was to provide empirical data to back up the agency's conclusions. In order to jump-start that effort, the FCC announced that it would be holding a roundtable discussion with researchers to discuss ownership policy on October 19.

Roundtable Discussion on Media Ownership

The announcement from the FCC's Office of Plans and Policy said there would be two panels; the first would address ownership polices and competition with an emphasis on the relationship between ownership limits and market performance (FCC, 2001e). This session would cover the merits of issuing *ex ante* rules versus making determinations on a case-by-case basis. The panelists were asked to comment on which markets they thought were most relevant to the FCC's consideration of ownership policies and what the relative costs and benefits of horizontal caps, cross-ownership restrictions, and access regulations might be. The second panel on diversity and localism was created to explore the type of diversity that ownership policies should promote, the extent to which outlet diversity produces source and/or viewpoint diversity, the meaning of localism, and whether local ownership results in locally oriented programming. The meeting was scheduled for late October.

There were several economists on the first panel. Stanley Besen, a vice president at Charles River Associates, a firm that offered economic and antitrust consulting and litigation to support media and telecommunications companies and other industries, was on the panel (Besen, 2006; FCC, 2001f). Besen also had a solid record as a Telecommunications consultant for organizations such as the Brookings Institute and the Rand Corporation. He was also a former economic policy analyst for the FCC, and he had taught at Rice, Columbia, and Georgetown Universities. Besen was also the author of several books that employed economic methodology to analyze communications policy. He earned his doctorate in economics from Stanford.

Mark Cooper, the director of research at CFA, and the president of Citizen’s Research, an independent consulting firm, was also on the panel (FCC, 2001f). Cooper received a PhD in sociology from Yale, but his main area of expertise was in energy, telecommunications, and economic policy analysis. As a consultant, Cooper had testified on regulatory, antitrust, consumer protection, and other public policy issues dealing with Internet and e-commerce, health care, energy and Telecommunications before Congress, federal agencies, and the courts. Cooper too was a prolific writer, publishing numerous articles in law reviews and academic journals on the subject of media, antitrust regulations, and access to broadband technologies. A third member of the panel was W. Robert Majure. He had a doctorate in economics from MIT and extensive experience at the antitrust division of the Department of Justice, especially in the area of investigations into local marketing agreements among television stations, mergers between cable systems and content providers, as well as investigations into allegations of antitrust violations in those industries (FCC, 2001f).

Bruce Owen was the fourth member of the panel, and he was the president of Economists Incorporated, a Washington DC consulting firm specializing in antitrust and regulatory issues (FCC, 2001f). Owen held a PhD from Stanford in economics, served as the chief economist of the Antitrust Division of the U.S. Department of Justice during the Carter Administration, and served a member of the White House Office of Telecommunications Policy during the Nixon administration. Owen also had an extensive publishing record including titles such as *Television Economics, Economics and Freedom of Expression*, *The Political Economy of Deregulation*, and *The Internet Challenge to Television*. Two FCC staffers, James Bird and David Sappington, were scheduled to moderate the discussion.

Powell began the dialogue by announcing that he was forming a MOWG created to develop an empirical analytical foundation for media ownership regulations (FCC, 2001a; FCC, 2001j). In his introduction to the panelists he said that he often felt frustrated because the debates over the rules were often cursory and unsubstantiated and not supported by empirical evidence or a comprehensive review of past experiences. He told the panels that he was creating the working group to facilitate the creation of evidence that would leave a legacy of rigorous data analysis as opposed to the "more superficial, often highly politicized benchmarks [used] for that debate" (FCC, 2001j, p. 5). Powell said the discussion was the first step toward reaching that goal.

However, it is notable that of seven experts who were asked to advise the Commission on ownership policies, five were classically trained economists (FCC, 2001f). Powell's attempt to gather empirical evidence that would support the FCC's position on ownership limits was an attempt to focus almost exclusively on panelists who would apply quantifiable economic methodology to their analysis. Accordingly, the more "superficial political benchmark" analyses offered by disciplines outside of economics were relegated to the sidelines. When Powell framed the questions addressed to the roundtable, he tried to exclude the possibility that negative externalities such as promoting civic discourse or promoting a marketplace of ideas would even be considered. Powell's attempt to frame the debate narrowly, based exclusively on classic economic theory, was a blind spot that would haunt him until the end of his term as he moved toward his goal to relax ownership restrictions at the FCC.

David Sappington, an FCC staffer, opened the discussion by reviewing the general questions that were sent to the panelists in preparation for the meeting (FCC, 2001j). The first question asked the panelists to consider whether harms might arise in the absence of government intervention, other than standard antitrust intercession, in the marketplaces involved, and how those harms might be related to the characteristics of these particular industries. The second question asked the panelists to discuss whether the FCC should intervene on a case-by-case basis.

Beson's main argument was that the FCC had failed in the past to attempt to tailor local ownership rules to competitive conditions in local markets (Besen, 2001; FCC, 2001j). He believed that the recent change in the duopoly rules that permitted entities to own two stations in one market in places where it would not lead to excessive concentration was a big improvement over the previous policy of ignoring the amount of competition from other independent stations in a local market. He advocated for fewer blanket prohibitions and a more flexible approach to other ownership rules, such as cross-ownership prohibitions, that would take into account the amount of competition in local markets from all types of media. Beson was adamant about the need for the FCC to adjust quickly to changing market conditions, and he chastised the FCC for relying excessively on data gathered from the industry, rather than generating its independently produced studies.

Cooper began his talk by saying that any economic discussion of the rules must be embedded within the legal and public policy framework that he thought ought to govern the area (2001; FCC, 2001j). He pointed out that Congress and the courts had repeatedly concluded that the media policy in this country was based on the promotion of the widest possible dissemination of information from diverse and antagonistic sources. He also said that antagonism of ideas is not the same as competition between products, and insisted that there was clear empirical evidence to support the idea that diversity of ownership matters. Cooper suggested that different media serve different needs and that each medium is not always substitutable for another. He also asserted that a purely classical economic approach to the problem of media ownership did not address political economy issues. Additionally, he said that the FCC, Congress, and the courts have always looked beyond mere economic efficiencies when considering consolidation in media, a position that is more encompassing than the Justice Department's approach to antitrust cases. He implored the Commission not to toss out the rules because they had failed to achieve a completely diverse marketplace in the past, but rather, the Commission should continue its policy of maintaining prophylactic structural rules. According to Cooper, these structural rules are important because those policies can ensure a level playing field so that unpopular voices are not denied the resources necessary to make civic discourse attractive. Furthermore, he said, structural rules can force the mingling of ideas so that accidental exposure is more likely. While economics will determine who gets to speak and who gets heard, it is important to remember that economic theory should serve the broader policy goals supported by the courts and Congress.

The next speaker was W. Robert Maguire (FCC, 2001j). Maguire said that antitrust actions could not always account for public interest harms that might result from abolishing ownership caps. However, in the interest of trying to confine the discussion to the role of competition in the marketplace, he said he would assume that the public interest is limited to something like efficiency of markets. Then he said he did not think it was meaningful to talk about the difference between the regulatory powers of the FCC or the antitrust analysis of the Department of Justice or the Federal Trade Commission. He said that media antitrust actions taken by the Department of Justice started with a threshold number. Maguire described it as a compromise hybrid version of ownership caps, where if a certain company exceeded the threshold level that the department had set, it would then be the basis for challenging a merger. If there were no FCC ownership restrictions, the Department of Justice would still have to set a somewhat arbitrary ceiling for deciding if it was appropriate to prosecute. Maguire said that the answer to the second question, whether it was appropriate to issue blanket rules versus examining each case as it arose, was really a political economy question. Stating that he was no political economist, he argued that the FCC would have to figure out whether the trade-offs between the cost and benefits of a one-size-fits-all approach were tolerable in the face of the probability that a broad approach will inevitably produce harms. On the other hand, a blanket approach would avoid consuming large amounts of resources and time that the

FCC would have to bear if it were to do an extensive review of each transaction that came down the line. He also said that it was important for the FCC to consider what the effects of selective enforcement of ownership caps might be on the efficacy of the agency's ability to enforce other rules.

Owen began his talk by saying that if one wished to take an antitrust guideline approach to media diversity, then every relevant advertising and programming market over the past 20 years has become less concentrated (FCC, 2001j). This suggested to him that previous ownership guidelines might not be meaningful anymore. Then Owen said he wanted to talk about the purpose of competition policy within that context. He agreed with Cooper that diversity is not any less a market outcome than are prices, quantities, or profits. He said it was important to understand that competition is not an end in itself. Although experience has shown that competition generally produces more reliable benefits for consumers than its alternatives, it is merely a pragmatic way for society to allocate resources. Owen acknowledged that cross-ownership rules appear to accept the notion that competition is a good thing in media policy, but he said the rules implicitly reject the sufficiency of the antitrust approach to regulating media. The rules reject the proposition that certain natural market outcomes that would not trigger antitrust review are acceptable in media markets. Owen talked about the Herfindahl-Hirschman Index (HHI) that is used to evaluate concentration in markets. The scale takes the market share of each firm, squares it as a percentage, sums the result, and multiples it by 10,000 (Cooper, 2003, p.114). Under the merger guidelines of the Department of Justice, a market is considered to be more or less unconcentrated if the HHI number is 1000 or less. However, Owen speculated that the FCC could possibly conduct empirical research that found that there were significant adverse effects on the price of advertising when HHI levels exceed 800. The FCC would then be justified in using an HHI score of 800 as a safe harbor for supporting ownership regulations.

According to Owen, merger guideline standards are generally applicable, but the numerical value of the scale is arbitrary (FCC, 2001j). The guidelines are not applicable to any specific industry across industry sectors. The HHI measures outcomes, not ease of access, or for the expression of ideas. In Owen's opinion, the Commission's historical approach to ownership regulation was the assumption that natural market outcomes would produce insufficient amounts of diversity of source, content, and access. The underlying principle beneath a policy that promotes diversity is the principle that the airwaves are a public resource that should be distributed as equitably as possible. Owen said that content diversity can be subjected to economic analysis, but this methodology presumes that competitive market outcomes are the most optimal conditions for media, which ignores the underlying reasons for promoting competition to begin with. He said the real question that needed to be addressed by rigorous research was if the operation of media markets from a political point of view requires a stricter competition standard than that which would be applied to other markets. Owen said it was hard to make economic sense of policy objectives based on ensuring the economic success of unpopular and unprofitable messages. He suggested that the FCC explore the possibility of conducting research to find out whether consumer benefits that result in natural levels of concentration are offset by the loss of diversity in concentrated markets. He closed by saying that more rigorous quantifiable data were needed.

During the question and answer session, despite some clear differences of opinion, all in attendance agreed that more rigorous studies needed to be conducted (FCC, 2001j). Some participants argued that the only acceptable research was quantifiable economic analysis, despite the fact that they all agreed that Congress had clearly expressed its preference for policy goals that were not easily quantifiable. Douglas Gomery, a participant on the next panel, said that other methods of research could provide evidence to support stricter guidelines than those imposed by economic analysis. Gomery suggested that worldviews and research methodologies outside of economic departments could get at political economy outcomes, but Beson pointed out that recent court decisions were demanding the use of rigorous economic analysis when evaluating the rationales for ownership regulations. On that note, the session was adjourned.

When the second session began, moderator Jonathan Levy from the FCC's Office of Plans and Policy asked the panelists to offer their opinions on what they thought the Commission’s goals should be with regard to diversity (FCC, 2001j). Levy also asked the panelists to consider if policies promoting ownership diversity were actually an effective means for advancing the Commission’s goal of furthering its diversity goals and if the panelists could support their positions with empirical evidence. Levy then asked the participants to think about localism and how that concept should be defined.

The first panelist to speak was Gomery, a professor from the University of Maryland who received his PhD in communications and economics from the University of Wisconsin (FCC, 2001f; Gomery Vita, 2006). Gomery’s research was focused on media history and economics, and his most recent book, *Who Owns the Media* co-written with Benjamin Compaine, won the Association in Education in Journalism and Mass

Communication's Picard prize for best media economics book of the year. The first thing Gomery said was that the reason they were all there was because of market failure that was being expressed in a number of ways by citizens who were upset over the negative externalities of the current policies. He explained that sometimes markets do not produce the goals that policy-makers would like and that discussing markets exclusively in terms of economic efficiencies did not take into account the social and political performance of media institutions. He said the concept of multiplicity of voices should be a fundamental criterion for measuring performance of media markets, as should the production of cultural quality. Gomery also said that equality of access should be an important measure of market outcomes. Gomery was in favor of retaining the Newspaper/Broadcast Cross-Ownership Rule (Gomery, 2001). Since most newspapers operated in a monopoly environment, Gomery did not think it was in the best interest of local communities to allow newspapers to merge with local television stations. He was also in favor of retaining cable ownership caps. Gomery concluded by saying that the Commission needed to look at models other than those of neoclassical economics so that negative externalities could be considered.

The next person to speak was Philip M. Napoli, an assistant professor of communications and media management in the Graduate School of Business Administration at Fordham University (FCC, 2001f; Napoli Vita, 2006). Napoli's research focused on media institutions and media policy. He wrote *Foundations of Communications Policy: Principles and Process in the Regulation of Electronic Media* and he earned his PhD in mass communications/telecommunications from Northwestern

University. Napoli declared that he was an enthusiastic practitioner of quantitative methodologies in his research.

Napoli began by saying that it was important to understand the underlying rationales for promoting diversity and localism through media ownership policy before one could attempt to assess whether existing rules were achieving their objectives (FCC, 2001j). He then proceeded to break each concept down into its discrete components. Napoli said diversity as a policy objective emerges from the marketplace of ideas metaphor, advocating the "widest possible dissemination of information from diverse and antagonistic sources" (*Associated Press v. United States*, 1945, p. 1424). The social intent behind this policy goal is to promote informed decision-making in a well-functioning democracy. This concept, he said, emphasizes the values of encouraging both a maximum number participants in the marketplace and the availability of a maximum range of viewpoints and cultural perspectives available to citizens. He said that whether one looks at this concept from a purely democratic theory perspective or an economic theory approach, it is important to understand its underlying rationale (Napoli, 2001b p. 2).

Napoli then went on to say that the concept of diversity could be broken down further. Source diversity, he said, included diversity of ownership, diversity of outlets, and diversity of programming, as well as diversity in the workforce. Content diversity includes format or program type, the demographic diversity of the audience, and the diversity of ideas and viewpoints available to the audience. These components of diversity have traditionally been part of the Commission's policy-making, but Napoli proposed that exposure diversity be added to the model (2001b). According to Napoli, this would allow for an assessment of how audience members actually respond to the availability of diverse content. Napoli also believed that communications policy should take into account the barriers to entry for new station owners. He told the panel about a study he conducted that measured the power ratio of radio stations in selected markets where African American and Hispanic audience demographics were available. He found that many radio stations catering to minority audiences had a higher ratio of listeners to advertising dollars than other stations in the same market. That meant that the minority-targeted stations were less stable financially and more likely to go off the air than other stations. Napoli thought that the FCC should consider the potential financial handicaps that are inherent to serving minority audiences as a routine part of its policy assessments.

When Napoli began to address the issue of localism, he reminded the panel that localism is also a political and cultural goal that encompasses everything from localized control of schools and government to communications policy (FCC, 2001j). He said that the FCC has long presumed that locally controlled broadcast outlets will provide programming that serves the needs of the community. However, he said that there has not been much empirical data produced that support or undermine that supposition. Napoli suggested that these kinds of questions could not be addressed with traditional economic-based policy analyses. As an example of the kind of research that could be done to address the problem, Napoli told the panel about a study he conducted that found that the point of origin of public affairs programming may not be as important as the fact that locally owned stations tended to offer more public affairs programming regardless of its source. He closed by saying that if policy-makers were willing to accept that localism is an important component of media policy on par with diversity, then the panel must be willing to accept methods and data that might not fit traditional models.

The final member of the panel was Joel Waldfogel, who introduced himself as an unrepentant economist (FCC, 2001j). Waldfogel, a professor of business and public policy at the Wharton School of the University of Pennsylvania, conducted research focused on law and economics and industrial organization (FCC, 2001f; Waldfogel, 2006). His publication record included empirical studies of price advertising, media markets and minorities, and the operation of differentiated product markets. He earned his PhD in economics from Stanford. Waldfogel devoted most of his talk to reviewing some recent studies he had conducted and offered his findings up for consideration. Waldfogel (2001) said empirical evidence suggested that markets tend to deliver less satisfaction to small groups with atypical preferences (FCC, 2001j). He said that this is not necessarily an inefficiency outcome, and may not be a problem at all. He said that increased consolidation in media markets and a reduction in minority-owned stations might not be a problem in terms of economic outcomes but that the political outcomes that result from consolidation are important. For example, Waldfogel said that he conducted a study that looked at levels of political participation for African Americans in communities where there were Black-targeted media outlets, and found that in those communities, there was a higher tendency for African Americans to vote. Waldfogel also reported that in another study he had done, he found that in areas where a national newspaper became available, local newspaper circulation declined along with local political participation. He urged the panelists to step away from attempting to measure localism and diversity from an economic outcome perspective and to consider behavioral outcomes instead.

After all the panelists spoke, Levy asked the participants to tell him what kind of data the FCC should be looking for (FCC, 2001j). Waldfogel suggested that Arbitron, Nielsen, and the Audit Bureau of Circulation might be good sources of data, but Gomery pointed out that those organizations were commercial research companies, and therefore they were not necessarily asking the questions that the FCC wanted answered. He suggested, and others agreed, that the FCC should gather its own data independently. Napoli said that the FCC should conduct media usage surveys annually that would get at questions of how audiences responded to changes in their own media environment. However, Owen pointed out that if the FCC wanted to gather useful data they needed to have a clearer understanding of what the goals and objectives of the study would be. According to Owen, he had not yet heard a clear articulation of the questions the Commission wanted to answer, and any valuable research depends on a clearly defined hypothesis before any methodology can be applied. However, Cooper thought that some of the research that Waldfogel conducted on audience behavior did get at the question of whether diversity of ownership matters and offered a starting point for determining threshold standards for enforcement. Cooper said that even if they did not have a precise articulation of Congressional intent concerning upholding the public interest, there were rigorous ways of addressing the sociological and political questions that the FCC and the panelists had identified. Beson said that the kinds of data that Waldfogel and Napoli were producing did not address issues of causation. Beson said content analysis, as a method, was inadequate because it depended on the evaluation of the researcher and the courts would not accept that as a valid research design.

There was much discussion about the validity of various research designs, but in the end the consensus was that even though there were many ways of gathering rigorous quantitative data outside of the parameters of traditional economic analysis, the courts would not accept it. According to the panelists, courts understand merger analysis because it is a lot easier to predict economic outcomes. If a researcher can show that prices will rise under a given set of conditions, the courts can say higher prices are a bad outcome. However, if a researcher presents sociological evidence that argues in favor of maintaining local ownership because a citizen might be exposed to the discussion of local public affairs programming, no specific outcome can be measured. The upshot of the meeting was that content diversity and the value of localism would be almost impossible to quantify.

If Powell had been listening carefully to what the economists were saying, he might have realized that his own handpicked panels of experts were telling him that the problems he sought to address were not only economic problems, but political and social problems as well. As such, Powell was asking economic researchers to measure outcomes that were not amenable to neoclassical economic methodology. It may be that Powell's experience in merger analysis at the Department of Justice and his experience as a law clerk for the same court that would pass judgment on his decisions regarding media ownership regulations colored his interpretation of the discussions conducted during the Roundtable discussion. As a member of an interpretive community that relied on quantifiable economic analysis as a tool for evaluating consolidation in markets for a wide range of commodities, he may not have recognized the political ramifications of relying exclusively on quantifiable data to address consolidation in media.

Nonetheless, on the same day that the Roundtable discussion was held, Powell issued a press release officially stating that the Commission decided to go forward with its Media Ownership Working Group (FCC, 2001a). In the press release issued on the FCC web site, Powell said,

> Rebuilding the factual foundation of the Commission's media ownership regulations is one of my top priorities. For too long, the Commission has made sweeping media policy decisions without a contemporaneous picture of the media market. We need to rigorously examine whether current forms of media regulation are achieving the Commission's policy objectives, and how changes in regulations would affect the policy goals of competition, diversity, and localism. I am creating the Media Ownership Working Group to bring a sharp focus to these tasks. (FCC, 2001a, p.1)

Powell appointed W. Kenneth Ferree, chief of the Cable Services Bureau; Paul Gallant, special advisor to the bureau chief; Cable Services Bureau; and Nandan Joshi, an attorney-advisor to the Office of General Counsel to lead the working group. Jonathan Levy, deputy chief economist; Robert Ratcliffe, deputy chief of the Mass Media Bureau; David Sappington, chief economist; and Royce Dickens Sherlock, deputy chief of the policy division of the Cable Services Bureau, were also assigned to the group. Powell said the findings of the group would be used in future media ownership proceedings. There was not a political economist among them.

Summary

When Powell was appointed as a FCC Commissioner in 1997, he came to the agency as an outspoken proponent of a deregulatory agenda. He clearly believed that a deregulated market would best serve the public interest in media ownership policy.

Powell's professional background as a law clerk on the DC Court of Appeals, a court that relied heavily on empirical data when reviewing administrative law, may have influenced Powell's determination to provide economic data to support the loosening of ownership restrictions. As the chief of staff of the Antitrust division in the Department of Justice, Powell was certainly well acquainted with tools such as the HHI index that measured concentration according to economic statistics. Powell's conviction that the public interest could be served by carefully constructing economic methodologies that supported his perspective on media ownership was perfectly in keeping with the interpretive paradigm that governed his professional life. However, Powell's avowed rejection of the political ramifications of his decisions was a blind spot that eventually escalated the tension between him and other stakeholders in the decision-making process.

Commissioner Martin was clearly supportive of President Bush's deregulatory agenda, and Commissioner Abernathy, having spent the bulk of her career in the telecommunications industry, was firmly inline with the industry's perspective.

However, Tristani and Copps were oriented toward different perspectives. As a long-time aide to Senator Hollings, Copps may have understood better than Powell that some aspects of the public interest in media ownership could not be measured by statistics alone. Tristani placed more importance on the marketplace of ideas than on the market itself. The conflicting values held by the Commissioners were all but certain to lead to more controversy as the Congressional mandate to review ownership policies every 2 years was implemented.

The court had already remanded the issue of cable limits back to the FCC, and two important cases challenging Kennard's first review were looming over the

Commissioners. As Congress held hearings about media concentration, it was also apparent that many members of the legislature were leery of allowing more concentration in media and their constituents were less concerned with the HHI index than they were about their perception that two few corporations controlled too many media outlets.

When Chairman Powell created the Media Ownership Roundtable, even his handpicked experts warned him that the public interest in media ownership issues could not necessarily be measured quantitatively. Although the HHI index could provide a reasonable approximation of the amount of competition in discrete segments of the media, it was not amenable to measuring qualitative values such as diversity, localism, and the contribution that various forms of media made to democratic discourse.

Many public interest organization leaders and members of the public were concerned about the negative externalities that could result due to excessive concentration in media. Many of these citizens and organizations had a long history of involvement in media reform issues, many groups formed as a result of the repercussions of the Telecommunications Act of 1996, and still others would decide to commit themselves to media reform in the year to come. However, all of these participants had one thing in common. They were alarmed by what they saw as the detrimental effects of media consolidation in a participatory democracy, and they were determined to make their voices heard.

CHAPTER 5

THE FOUNDATIONS OF A MOVEMENT

During the 1990s, as Congress prepared to rewrite legislation that had governed broadcasting and telecommunications for half a century, there was a growing consensus among several key public service and philanthropic organizations that media consolidation was having a negative effect on the quality of mass communication in this country. Some of these organizations were founded decades before the passage of the Telecommunications Act of 1996, some of them arose as a response to it, and some of them were founded to create policy for new media. However, all of these organizations began to coalesce around issues related to media ownership during the latter part of the 1990s. The organizational work laid down by these groups created the foundation for cohesive opposition to Powell's plan to further modify media ownership regulations at the beginning of the 21st century. This chapter discusses some of the key players and issues that propelled the media reform movement forward.

Public Interest Organizations

One impetus for the creation of a grassroots backlash against media consolidation in 2003 began a full decade earlier with the establishment of the Telecommunications Policy Roundtable (TPR). Founded in 1993 by Jeffrey Chester of the Media Education Center to disseminate information about telecommunications issues, the coalition of over

70 public interest organizations sought to create policy for a new communications infrastructure that would include the Internet and other new technologies (Aufderheide, 1999; Love, 1994).

That summer, TPR issued a press release that contained seven basic principles it said were essential to the foundation of any new telecommunications policy-making ("New Coalition," 1993). The first principle to be upheld was the right of universal access to affordable news, education, and government information. According to TRP, this basic right was vital for the maintenance of a democratic society. The second principle forwarded by TRP was that new communication networks should be designed in order to facilitate interactive communication between individuals, groups, and networks. Additionally, any new network should be required to allow all groups and individuals to express themselves freely. The fourth principle, one that would resonate in the coming years, proclaimed that structural diversity and competition needed to be protected by policy-makers because no one entity should ever control both the delivery conduit that enters an individual's home and the content contained in it. The coalition also submitted that a new communication infrastructure should support nondiscriminatory practices in the workplace and that privacy standards should be carefully protected and extended. Finally, TRP declared that any new information infrastructure should promote democratic policy-making because every American deserved to be heard on issues before Congress.

TRP held monthly meetings in Washington DC that were attended by 50 to 70 members (Aufderheide, 1999; "New Coalition," 1993). Among them were the Media Access Project (MAP), the Consumers Union (CU), the Consumer Federation of America

(CFA), Fairness and Accuracy in Reporting (FAIR), Common Cause (CC), and the Benton Foundation. By 1994, the coalition had formed a number of committees to work on outreach, pending legislation, the organization of a public interest summit with the Clinton/Gore administration, and the development of a model for proposed telecommunications legislation. One important innovation forwarded by TPR was the effort to use the growing popularity of e-mail and the Internet as an organizing tool. TPR recognized that the Internet offered new possibilities for uniting grassroots organizations around a common cause. Even though some of the Telecommunications Roundtable member organizations were asked to provide input to legislators as they considered the regulatory framework that would be eventually adopted into the Telecommunications Act of 1996, ultimately, industry representatives had the most influence over the final version of the legislation (Aufderheide, 1999; McChesney, 1999). However, the coalition created by TRP set a precedent for cooperation and the exchange of information among public interest groups concerned with media ownership issues. TRP still meets monthly in Washington DC, and the Coalition for Networked Information currently hosts an open electronic TPR forum on its website (Coalition for Networked Information, n. d.).

One member that became an influential voice and important advocate for the retention of media ownership restrictions in 2003 was the Office of Communication of the United Church of Christ, Inc. (OC Inc.). Founded in 1959 as part of the church’s commitment to the promotion of civil rights for communities that had been historically excluded from the media, this organization had long been a significant voice in communications policy debates (Ranly, 1976; United Church of Christ, n. d.). In 1966, OC, Inc. sued the FCC for renewing the license of a television station in Jackson, Mississippi, that aired blatantly racist programming. In that landmark decision, the U.S. Court of Appeals for the Washington DC Circuit forced the FCC to grant the church standing in the license renewal process (Krasnow et al., 1982; *Office of Communication of the United Church of Christ v. FCC*, 1969). The case established the right for citizens to participate in renewal hearings without having to show that they had an economic stake in the outcome. After the ruling, citizens groups routinely filed petitions to deny broadcasters their licenses in order to force stations to meet the programming needs of their communities.

Over the years, OC Inc. was involved with many media issues, such as seeking to improve the quality and quantity of children's programs (Austin, 1983; United Church of Christ, n. d.). The church also worked to improve the quality of local and national public affairs programming and has advocated for fair rates for cable services. In the 1990s, the Office created programs to promote diversity in media by supporting efforts to establish low-power radio stations; it campaigned for affordable access to emerging technologies and addressed issues of media consolidation. OC Inc. representatives have also filed numerous responses to FCC calls for comments on other broadcasting issues.

MAP, another member of the TPR, grew out of the movement that began with the United Church of Christ's litigation against the FCC in the 1960s (McChesney, 2004b; Media Access Project, n. d.; Ranly, 1976). MAP is a non-profit public interest telecommunications law firm that represents national and locally based organizations on behalf of listeners' and speakers' interests in electronic media and telecommunications. The organization also acts as a coalition builder for other public service groups, and its attorneys appear frequently before Congress and at conferences devoted to communications policy issues.

When MAP was first established, it focused primarily on issues related to the Fairness Doctrine and antiwar and civil rights cases (Media Access Project, n. d.). However, in the 1990s, MAP branched out and successfully defended “must carry” rules that require cable system operators to transmit local broadcast stations in their area of service. MAP also served as cocounsel for the plaintiffs in the landmark *Reno v. American Civil Liberties Union* case that invalidated the Communications Decency Act and extended the highest level of First Amendment protection to the Internet. By the late 1990s, MAP was involved with the low power radio movement and was increasingly concerned with media consolidation (McChesney, 2004a; Yochi, 2003). MAP also operates a website that provides an extensive list of resources and archival documents for citizens interested in these issues. MAP eventually represented the Prometheus Radio Project in litigation challenging the FCC’s media ownership policies (*Prometheus Radio Project v. FCC*, 2004).

FAIR, another founding member of TRP, was established as a media watchdog group in 1986 to provide criticism of media bias and censorship, but by the mid-1990s, it too was becoming more active in the area of media consolidation (Fairness and Accuracy in Reporting, n. d.; 2006; Jones, 2002; McChesney, 2006). The organization typically works with journalists, activists, and scholars to promote greater diversity in media. According to its website, “FAIR believes that structural reform is ultimately needed to break up the dominant media conglomerates and to establish independent public broadcasting and promote strong nonprofit sources of information” (Fairness and

Accuracy in Reporting, n. d.). FAIR also produces a weekly radio show called *CounterSpin* and publishes *Extra*, a magazine that focuses on media criticism. FAIR has taken advantage of the Internet to disperse *Action Alerts* to its network of media activists. FAIR also became a forceful voice in the media reform movement (Klinenberg, 2007; McChesney, 2004a).

William Benton, the founder of the advertising agency Benton & Bowles, the publisher of the *Encyclopedia Britannica*, creator of the Voice of America, and former U. S. senator established the Benton Foundation in 1948 (Benton, Foundation, n. d; Wallace, 2004). Benton had a life-long interest in promoting the use of media for educational purposes and believed that electronic technology should serve the public interest by promoting democratic values (Fagerheim & Amato, 1998; Fratkin, 2002). When Benton's son Charles took over the presidency of the Benton Foundation in the 1970s, the foundation already had a long history of supporting public broadcasting and media reform. Notably, the Benton Foundation provided the seed money and direction for the National Citizen's Committee for Broadcasting, headed by former FCC Commissioner Nicholas Johnson during the late 1960s and 1970s, an instrumental group during the media reform movement of that era.

Charles Benton served as a member of the Presidential Advisory Committee on Public Interest Obligations of Digital Television Broadcasters during the Clinton administration (Benton Foundation, n. d.; Jessel, 1998). In the mid-1990s, the foundation made the transition from a primarily grant-making organization, to an operating organization generally devoted to the field of communications. The foundation has multiple programs dedicated to media education and frequently organizes forums and conferences on the topic of digital technologies and broadcasting. Its website provides a free online news service and offers many resources for educators and media activists. The foundation became a critical resource for many other organizations that were opposed to increased media consolidation during the 1990s and beyond.

CC is yet another long-established organization that became a key player in the debate over media ownership policies, although it would not take an active role on the issue until 2003 (Common Cause, n. d.). John Gardiner wanted to create an organization that would represent citizens' interests in Washington and founded CC in 1970 (McConnell, 2004; Wertheimer, 1995; Wieck, 1973). Its mission as a nonpartisan, grassroots organization is to lobby Congress on pending public interest legislation, to educate the public about its concerns, and to organize its members to weigh in on issues. While Common Cause was an early member of the TPR, it had never been primarily devoted to media issues until its members expressed so much concern about media consolidation that it made media ownership its top organizing issue in 2003 (Klinenburg, 2007; McChesney, 2004b).

Two other consumer organizations that were initial members of TPR played key roles in the debate over media ownership restrictions in the 1990s and into the 2000s. CU was founded in 1936 to protect consumer's rights and offer unbiased assessments of products and legislation affecting consumers (Consumer's Union, n. d.; Mayer, 1989). Its magazine *Consumer Reports*, featured articles advocating for public interest in broadcasting going back to the 1960s ("Here," 1962; "Truth,"1962 "What?" 1961). In 1972, CU founded an advocacy office in Washington DC to provide information and testimony to federal agencies and Congress and to form coalitions with other organizations and individuals to build support for stronger consumer protections. Advocates from this office have consistently campaigned for affordable telephone, cable, and Internet services for consumers and have maintained that media ownership rules should be sustained to ensure competition and diversity in the media. CU also became an essential organizing component of grassroots opposition to the relaxation of media ownership regulations as the FCC moved toward its 2002 biennial review.

CFA was founded in 1968 as an advocacy, research, education, and service organization for consumers (Angevine, 1969; Consumer Federation, n. d.). Its membership consists of over 300 nonprofit organizations representing in excess of 50 million people; therefore its influence on policy-makers is considerable. As a research organization, CFA publishes reports that investigate consumer issues by conducting surveys, focus groups, and other research. CFA uses the information from its studies to conduct consumer initiatives, educational campaigns, books, brochures, news releases, and newsletters. CFA also provides support to other organizations and frequently organizes conferences on issues of concern.

CFA had a long history of involvement with media-related issues, and Mark Cooper, director of research, is the organization's chief spokesperson on telecommunications (Consumer Federation, n. d.; "Groups Urge Veto," 1995; Martinez, 1997). A vociferous opponent of media deregulation, Cooper was a panelist on the FCC's Media Ownership Roundtable (Cooper, 2001). Additionally, CFA operates a website pertaining to media ownership with a wealth of resources and studies available to the public. The organization firmly opposes further relaxation of media deregulation, and it took an active lead in the media reform movement.

While these established organizations and many others were filing comments with the FCC, speaking out to the public about media issues and testifying before policy makers, another group of more loosely organized activists were advocating for the creation of a new community based, low-power radio service.

The Micro-Radio Movement

Before there was a federal agency in charge of policing the electromagnetic spectrum, educators and amateur pioneers operated low power radio stations all over the country (Barnouw, 1968; Douglas, 1987; McChesney, 1993). However, when the commercial applications of the medium became apparent, regulators eliminated low power licenses in favor of the wider geographical coverage that full power broadcasters could achieve. The bias in favor of high power commercial broadcasters led to the steady decline of educational institutional licenses on the AM dial.

However, in 1947 the FCC recognized that many educational institutions did not have the resources to support full power stations, so it granted an experimental Class D license to Syracuse University (Aguilar, 1999; Stavitsky et al., 2001). This allowed the station to operate with a power of 10 watts on the new FM channels reserved for noncommercial use, as opposed to the minimum power requirement of 250 watts for a standard license. The station's signal could be heard within a radius of 3 miles of campus. The station was a success, and soon the FCC granted Class D licenses to other noncommercial stations. Most were awarded to educational institutions, but some were operated by community groups. In some areas the new low power stations were the only locally based stations in the community. Although most of these stations eventually either upgraded to full power licenses or went off the air, the FCC allocated the last Class

D license in 1978 before eliminating the service after industry critics argued that the low power licenses were not an efficient use of the electromagnetic spectrum.

Although there have been many unlicensed pirate radio stations that have operated clandestinely in the past, a new breed of pirates emerged in the late 1980s that operated openly (Brand, 2004; Coopman, 1999). Mbanna Kantako founded Black Liberation Radio from his apartment in the John Hay housing project in Springfield, Illinois in 1986 for $600. In interviews, Kantako said that he believed his community was ill served by existing media in the area, so he decided to start his own station. Black Liberation Radio was able to reach approximately 1,000 residents living within a mile and a half of Kantako’s apartment using a two-watt transmitter. Kantako’s unique brand of radio soon captured the attention of his community, along with that of the legal authorities and other media. Despite the FCC’s efforts to shut down the station, Kantako insisted that his station existed to bring his community together and empowered it in a way that no other commercial radio stations would. He refused to cease and desist. The FCC fined him, but he stayed on the air. The Committee for Democratic Communication, an arm of the National Lawyers Guild, offered to represent him in court. However, Kantako was not interested in becoming a test case for micro-radio. Nonetheless, he did put together a widely distributed video that demonstrated how anyone could put a low cost micro-radio station on the air.

Others began to follow Kantako’s lead, and low power, unlicensed stations began to multiply all over the country (Brand, 2004; Coopman, 1999; Klinenburg, 2007). The movement was fueled by dissatisfaction in the quality and scope of news coverage in mainstream media, along with displeasure over the effects of increasing consolidation in the industry. The highly criticized coverage of the Gulf War in 1989-1990 only increased the sense of outrage that many micro-radio proponents felt. Many radio activists believed that they could do a better job of informing their communities themselves (Coopman, 2000a). Low-Power FM (LPFM) represented a return to localized programming that addressed the needs of specific communities. Many of these stations produced news and political commentary and played music featuring local bands. Most of these stations were programmed by volunteers who had wide-ranging musical tastes and a desire to share their knowledge with the community. Most abhorred the rigid formats of commercial stations and wanted to broadcast programming that was unfiltered by consultants and commercial restraints.

In the early 1990s, a community activist named Stephan Dunifer began broadcasting his version of community radio via a low power transmitter in California (Brand, 2004; Coopman, 1999, 2000a; Klinenberg, 2007). After the FCC shut down the station that Dunifer built with 95 other volunteers in the greater San Francisco Bay area, he continued to broadcast without a license, but with a portable transmitter. In 1994, the government brought a case against him, saying that he had violated FCC regulations (*U.S. v. Dunifer*, 1998). Dunifer argued that the spectrum scarcity rationale was no longer valid and that the FCC was abridging his First Amendment rights by denying him a license for a low power license. Dunifer eventually lost his case on technical grounds, because he had never actually applied for a license. However, in the meantime, other radio activists were reclaiming the airwaves all around the country (Markels, 2000). According to Coopman, (1999) the common goal of these broadcasters was to blanket the country with micro-radio stations so the FCC's enforcement abilities would be overwhelmed. The goal was to force the agency to legalize the service. During the first 10 months of 1998 alone, the FCC shut down over 250 of these stations, and it is impossible to know how many more stations escaped detection (Kennard, 1998). Despite pressure from the NAB to enforce the rules, the FCC was hampered by the mobility of micro-radio transmitters and the unconventional structure of these volunteer organizations.

As the movement grew, it became more organized, at least partly because of increased access to e-mail, listservs, and web sites (Coopman, 2000b). Micro-radio broadcasters began to publish regular reports and newsletters on the Internet. These sites kept activists and other members of the public updated on technical and engineering issues, legal issues, and actions pending before the FCC. As more people learned about the movement, these electronic networks expanded, and more members of the public became advocates for the creation of a legal low power radio service.

On February 5, 1998, J. Roger Skinner filed a petition asking for a rulemaking with the FCC to consider licensing low power stations (Brand, 2004; Coopman, 1999). Another petition from Nicholas Leggett, Judith Leggett, and Donald Schellhardt was submitted on March 10 (Brand, 2004; McConnell, 1998a, 1998b; FCC, 2000h, 2000i). The two proposals were a bit different. Skinner wanted the FCC to create three classes of low power service. The primary service would operate between 50 to 3000 watts, another between 50 and one watt, and a third would be available for special events at between 1 and 20 watts. In contrast, the Leggett and Schellhardt's proposal called for 1-watt stations on both the AM and FM bands.

In a speech delivered to the a meeting of the NAB explaining why he supported the creation of a low-power service, then FCC Chair William Kennard told broadcasters that he thought of radio as the quintessential local medium. He said he was worried about this unique characteristic of radio in the face of recent changes in the structure of the radio marketplace (Kennard, 1998). Kennard said that although the radio industry was more profitable than it had ever been, the Telecommunications Act of 1996 had led to unprecedented consolidation in radio. After assuring broadcasters that his first responsibility was to preserve the most efficient use of the broadcast spectrum, he said,

> I am concerned when I talk to small independent broadcasters who tell me that they are being squeezed out of their markets. I am concerned when I talk to advertisers who tell me that large multiple owners have locked up certain demographics in many markets. And I am concerned when I talk to small entrepreneurs, including minorities and women, who tell me of their fears that they will have to abandon their dreams of ever owning a broadcast station. We have a tradition in this country that cherishes many voices in the broadcast marketplace. It is a good tradition. As Vice President Gore said recently “this isn’t just a question of diversity, it’s question of democracy.” (Kennard, p.5)

Later in the speech he told the broadcasters that the FCC was seriously considering the proposal to license micro-radio stations, a proposal he thought would be a more efficient use of the spectrum. Kennard said that third adjacent channel spacing requirements were no longer necessary due to improvements in transmitting technology.[2] After conducting extensive engineering field studies over 2 years, the FCC went ahead with its plans to create a LPFM service. On January 27, 2000, the FCC issued a order that created two new low power FM services, one 10-watt, and one 100-watt (FCC, 2000g, 2000h, 2000i). The maximum range for broadcasters who wished to apply for a

[2] The third adjacent channel spacing requirement creates a buffer zone around allocated frequencies. By eliminating it, more signals can be squeezed into existing spectrum space.

10-watt low power licenses would be approximately 3 1/2 miles, a 100-watt station could potential cover a distance of up to 10 miles. The Report and Order said that the FCC had determined that the elimination of third adjacent channel restrictions would not interfere with existing broadcasters' signals.

The Report and Order also explained why the FCC was allowing this new kind of broadcast license (FCC, 2000i). They had received thousands of comments from citizens who wished to create a service that would serve their specific communities. The FCC also wanted to create a mechanism that would provide a proving ground for new entrants into the industry and a service that would allow the voices of community-based schools, churches, and civic organizations to be heard. The Report and Order stated that LPFM would be strictly noncommercial, and licenses would be restricted to community organizations that did not already possess a license. The idea was to create an inexpensive and very localized service that would allow community organizations with an inexpensive way to communicate with their neighbors. The FCC would take applications for LPFM in five rounds determined by which state an applicant resided in.

According to the FCC,

> Our goals in establishing this service are to create opportunities to allow local groups, including schools, churches and other community-based organizations, to provide programming responsive to local community needs and interests....We believe that noncommercial licensees, which are not subject to commercial imperatives to maximize audience size, are more likely than commercial licensees to serve small local groups, such as linguistic and cultural minorities or groups with shared civic or shared educational interests that may now be undeserved by advertiser supported commercial radio and higher powered noncommercial radio stations. (2000g, p. 4)

Congress Steps In

Despite widespread public support for LPFM, the NAB convinced Congress to introduce a bill that prohibited the service (Brand, 2004; Klinenburg, 2007). Testifying before the House Subcommittee on Telecommunications, Trade, and Consumer Protection, on February 17, 2000, NAB President Edward Fritts said LPFM would interfere with the spectrum space of existing broadcasters and he accused the FCC of abandoning its policy of preserving the most efficient use of the spectrum (Albiniak, 2000; H.R. 3439, 2000). Fritts also said micro-radio would drain revenue from small independent stations that already provided community services. NAB said that its own independent field tests proved that low power broadcasting would interfere with existing broadcaster's signals, and then the Fritts provided each member of Congress with a demonstration compact disk to prove it (FCC, 2000e).

Even before the FCC had issued its order authorizing low power radio, Senate Bill 2068, a bill that would have completely annulled any FCC decision to allow low power radio, was also introduced in the waning days of the first session of the 106th Congress. A similar bill had been introduced in the House (H.R. 3439, 1999). After returning from the break, before any hearings could be held, Senator McCain attached a rider to an important appropriations bill that mimicked the language in S. 2068 because the appropriation bill had a better chance of passing (S. 2518, 2000). During the appropriation discussions, Senator Harkin said that the rider was a classic example of caving into special interests. He admonished McCain for creating legislation behind closed doors, saying that the rider was a way of avoiding an open discussion of the issue. Harkin pointed out that the U.S Conference of Mayors, the National League of Cities, the

CU, and many religious organizations supported LPFM, including, but not limited, to the United Church of Christ and the U.S. Catholic Conference. Harkin asserted that those organizations supported LPFM because the stations will make more programming available to the public and provide outlets for news and perspectives not currently featured on local radio stations (Stavitsky et al., 2001).

Despite growing Congressional opposition for the new service, the FCC went ahead with its plans. On March 17, 2000, it conducted its first lottery for one of five regional areas that could petition the agency for a low power licenses, and by September 15, the FCC had received over 1200 applications (Brand, 2004; FCC, 2000h). Yet, in September, the FCC adopted a Reconsideration Order that reinstalled the third adjacent channel requirements if the frequencies chosen by potential licensees were close to radio reading services (FCC, 2000f).

Also in March, it was revealed that the NAB compact disk which was distributed to members of Congress did not portray actual interference that might be experienced due to low power broadcasting (Hatfield, 2000). According to Dale Hatfield, chief engineer for the Office of Engineering and Technology at the FCC, and Roy Stewart, chief of the FCC's Mass Media Bureau, the NAB disk was produced by artificially mixing two previously recorded radio signals and was not a demonstration of actual interference between two operational stations. The CD furnished to Congress was recorded inside a studio, not from the field as the NAB had implied. In May, the FCC issued a press release on its web site entitled *Low Power FM Radio Service: Allegations and Facts* (FCC, 2000e). The document was a point-by-point refutation of the allegations that were making the rounds of Congress. The Commission said it had taken 2 years to study the issue of low power radio and had granted four extensions to the comment period because the NAB requested more time. Hatfield said that it believed that the FCC engineering studies were legitimate, and he questioned the impartiality of the engineers that conducted the study for the NAB.

Some members of Congress were incensed that the FCC was instituting a new class of radio licenses that would compete with existing commercial broadcasters without consulting them (Bateman, 2000; Labaton, 2000). Representative Tauzin told members of the House that he intended to make a formal request to the Justice Department to investigate whether or not the FCC exceeded its authority when it sent memoranda in favor of LPFM to Congressional aids. Tauzin cited a law that said that no part of the monies appropriated by Congress shall in the absence of express authorization be used directly or indirectly to pay for the personal service, advertisement, telegram, telephone, or letter printed, or written matter, or other device intended or designed to influence any member of the United States Congress (18 U.S.C. §1913).

Meanwhile, President Clinton threatened to veto any appropriations bill that contained the LPFM rider, and Congress decided that a compromise would be in order (Albiniak, 2000). Senator Gramm introduced S. 3020, a modified version of the bill called The Radio Broadcasting Preservation act. An identical bill was introduced into the House of Representatives. The appropriations rider was subsequently dropped in favor of the Radio Preservation Act. The Act required the FCC to do more field testing before issuing any low power construction permits, and prohibited the FCC from dropping the third adjacent channel protection that would create spectrum space for the use of LPFM.

As the Clinton administration was ending, FCC Chair Kennard, a Democratic appointee, may have been thinking about how he could leave a positive legacy at the regulatory agency. He issued a press release published on the FCC website expressing his disappointment over the passage of The Radio Preservation Act (FCC, 2000c). Kennard said the House bill would cut the number of community LPFM stations by 80 % and added that

> special interests trumped over community interests today. While the NAB frequently opposes new competitive services, I'm particularly disappointed that National Public Radio joined with commercial interests to stifle greater diversity of voices on the airwaves. I can only wonder how an organization that excels in national programming could fear competition from local programming by these tiny stations operated by churches, schools, community groups and public safety agencies. (FCC, 2000c, p. 1)

When Congress restored the third adjacent channel requirement, it effectively eliminated the eligibility of a majority of the applicants. Although the FCC had received over 1,200 submissions for low power stations after the first filing windows closed, it was not until December 21, 2000, that the FCC determined that 255 LPFM applications were eligible for consideration under the third adjacent channel requirement (FCC, 2000f). After Powell assumed his position as chair, LPFM took a back seat to other priorities and it was not until the FCC was subject to an overwhelming political backlash due to its decisions on media ownership that Powell announced that his localism initiative in 2003 would include discussions about low power radio. As of July 2004, there were still more than 1300 applications pending (FCC, 2003a).

Dissatisfaction Festers

Although many of the aforementioned organizations were forceful proponents for low power radio, many of the people who became advocates for the service had not previously been actively opposed to media consolidation (Klinenburg, 2007; McChesney, 2004b). Among the thousands of applicants for LPFM licenses were the disappointed citizens who belonged to the civic organizations, churches, schools, and municipal organizations that wished to start community radio stations. Additionally, when the original micro-radio NPRM issued by the FCC stated that it would disqualify any applicant who had previously been involved with unlicensed broadcasting, many activists who had worked to legalize the service felt betrayed (Coopman, 2000a). Even though the court eventually overturned that prohibition, the FCC's decision served to further alienate a growing number of citizens who originally created and promoted the concept. When Congress limited the number of legal applicants that were eligible to broadcast a community-based alternative to highly consolidated, strictly formatted commercial radio, some felt that the concept of democratic communication was left behind. However, one group of activists would not be deterred.

The Prometheus Radio Project

During the same year that Congress passed the Telecommunications Act of 1996, Pete Tridish was an activist working on issues ranging from the antiapartheid movement to efforts to promote a freeze on nuclear weapons (Gurwitt, 2004). He and his friends were frustrated by the lack of media coverage for these issues and he thought the lack of exposure stemmed from corporate control of the media (Kelliher, 2003; Lotozo, 2002). They decided that they could do a better job of informing the public about these issues if they started their own radio station. After sending away for a transmitter kit, Tridish and 60 volunteers put Radio Mutiny on the air in 1997 without a license.

In a statement labeled *Your Dial was Made for Revolution* Tridish described the station and explained why he founded it.

> Radio Mutiny has set out to prove that in this era of corporate dominance and political backlash, this era in which a large portion of our society's culture and consciousness is industrially produced by media conglomerates driven by fantastic profit margins, this era in which a subservience to the cult of expertise and the hegemony of professionalism makes people question their competence to make any decisions for themselves or take any action outside of their specialized niche in the labor market—in this era, we have set out to prove that volunteers with a passion for culture and with vital, direct interest in civic affairs can make better programming than the mega-corporations controlling the majority of media outlets. With simple, accessible technologies, we can create a handmade sort of radio that, with its directness, its immediacy, its lack of pretense, will reach out from neighbor to neighbor and shake the foundations of an empire. ("Prometheus," n.d.)

Radio Mutiny was a nonprofit, all volunteer collective, and its mission was to provide "news, views, opinions and music not heard elsewhere on the dial" (Prometheus, n. d.). Like Lorenzo Milan and other community radio pioneers before him, Tridish and other micro-radio broadcasters wanted to counter the homogenized, highly formatted product that commercial radio stations offered its listeners with a highly diverse and extremely localized service created by volunteers who reflected the needs and concerns of their communities. Radio Mutiny considered itself to be part of a national movement of pirate broadcasters who operated without licenses because FCC requirements made it prohibitive to operate legally.

After 9 months on the air, the FCC served the station with a warning and finally seized Radio Mutiny's equipment and shut down the station (Markels, 2000; Prometheus, n. d.). However, by this time, the FCC was beginning to reconsider its stand on LPFM, so Tridish founded the Prometheus Radio Project to promote it. Like Radio Mutiny, the Prometheus Radio Project was/is a nonprofit organization that provides technical, legal, and organizational support to noncommercial community groups that wish to start LPFM stations. Prometheus conducts workshops, publishes manuals, and acts as a clearinghouse for information about low power broadcasting. Now completely legal, Prometheus has organized many "barn-raisings" that bring volunteers from all over the country to local communities to help build stations and teach volunteers how to run a radio station. Prometheus also acts as a public advocate on other related issues such as media ownership, spectrum reform, and the facilitation of public participation in the FCC rule-making process. By 2002, the Albert A. List Family Foundation, the Bread and Roses Community Fund, the Ford Foundation, the John D. and Catherine T. MacArthur Foundation, Soros' Open Society Institute, and Resist Inc. had all provided funding for the Prometheus' projects. Prometheus Radio Project would become a key player in the fight to rescind the relaxation of media ownership restrictions instituted by the FCC in 2003.

There were other signs in the late 1990s that citizens were becoming more dissatisfied with media consolidation. In 1996 the Institute for Alternative Journalism, an advocate of independent noncorporate reporting, sponsored the Media and Democracy Congress in San Francisco (Ledbetter, 1997b; Pollitt, 1997). The event was attended by over 700 journalists and activists who felt that mainstream media did not pay enough attention to issues that were not advertiser friendly, issues such as economic justice, racism, and poverty.

The following year, the institute held another conference in New York City that was attended by over 1,000 people (Balough, 2006; Konstantin, 1998). The conference featured academic panels with media reform advocates such as Mark Crispin Miller and

Robert McChesney, author Barbara Ehrenreich, and Amy Goodman of *Democracy Now!* *S*everal mainstream journalists, such as Walter Isaacson, managing editor of *Time*, and *New Yorker* media critic Ken Auletta, spoke about the connection between Wall Street and media corporations. The purpose of both conferences was to provide a forum where activists and journalists could meet to discuss strategies for providing more democratic alternatives to mainstream media coverage and to create a sense of community among the conference attendees.

The late 1990s also saw a resurgence of academic interest in public telecommunication and media ownership studies (Avery, 2001; McChesney, 2004b). A conference held in 2001 on public broadcasting and the public interest was well attended by activists and professors from across the nation, and the emergence of Independent Media Centers following the World Trade Organization protest in Seattle in 1999 created momentum for a growing movement centered around the notion of media reform.

Summary

By the time that the FCC announced the formation of the Media Ownership Working Group studies on October 21, 2001, the older more established media reform groups were gaining adherents to their cause through their web sites and other communications. Newer organizations such as the Prometheus Radio Project were focused more narrowly on specific issues, but local groups opposed to media consolidation were forming all over the country. As the movement became better organized, their messages began to resonate with ordinary citizens. What was once an issue that was an almost exclusive concern of dedicated activists and professionally managed public service organizations became a concern for many members of the general public.

Dissatisfaction with the mainstream media's coverage of the Gulf War, in addition to the shortcomings of commercial broadcasting, motivated action by established organizations and activists alike. When Congress severely restricted Kennard's efforts to create a new, noncommercial, local radio service, many citizen's saw it as further proof that mainstream media was beholden to corporations that were more interested in the bottom-line than in serving the needs of a democracy. While some public service organizations anticipated a new infrastructure for communications paved by new technology, many were also skeptical of policy-makers who seemed to capitulate to corporate interests when it came to the regulation of communication policy repeatedly.

The same issues that were gaining traction with the public would also engage the DC Circuit Appeals Court in the upcoming year (*Fox v. FCC*, 2002; *Sinclair v. FCC*, 2002). By the end of the year, Powell's effort to provide solid empirical evidence to sustain his effort to further relax media ownership regulations would come under intense scrutiny as Commissioner Copps began his campaign to involve the public in the FCC's decision-making process.

CHAPTER 6

POWELL PLOWS AHEAD

The new year was an eventful one for the discussion of media regulations. By January 2002, the FCC was preparing to issue an NPRM soliciting comments on the possible relaxation of several media ownership rules. The Appellate Court in the District of Columbia was preparing to issue decisions in the *Sinclair v. FCC* (2002) and *Fox v. FCC* (2002) cases that challenged local limits on television station ownership, cross-ownership rules, and the national caps on cable and television station ownership. At the annual NAB convention in Las Vegas, Chairman Powell reiterated his intention to proceed with his agenda, and by the end of the year, the FCC would release its Media Ownership Working Group (MOWG) studies to the public.

Sinclair v. FCC

On January 14, 2002, attorneys for the Sinclair Broadcasting Group presented their case before the Appellate Court in the District of Columbia (*Sinclair v. FCC*, 2002). Sinclair argued that limiting common ownership of television stations in local markets to eight independent voices was an arbitrary and capricious decision by the FCC. Sinclair also claimed that existing local marketing agreements made prior to the passage of theTelecommunications Act of 1996 should be grandfathered into the current rules and that the FCC's failure to do so constituted an illegal taking which is prohibited by the

Fifth Amendment to the Constitution. Additionally, Sinclair maintained that local restrictions on broadcast station ownership violated its First Amendment rights.

Attorneys for the FCC countered Sinclair's arguments by insisting that the FCC's eight independent voices rule was neither arbitrary nor capricious. The agency asserted that the basic tenet of communication policy, that the FCC should encourage the widest possible dissemination of information from diverse and antagonistic sources, required the agency to limit the number of broadcasting stations that one entity could control in local markets (*Sinclair v. FCC*, 2002). Accordingly, the Commission argued that its dual mission of maintaining diversity and ensuring that there was an adequate amount of competition in any given market was essentially an exercise of drawing a line in the sand until more specific empirical evidence could be found that defined an exact number of stations that would meet both requirements. The position taken by the FCC in the 1998 Biennial Regulatory Review Report, that more time was needed to ascertain whether the relaxation of local duopoly rules undertaken in a previous rulemaking would have a detrimental effect on local markets, was reiterated by agency lawyers. In essence, the FCC argued that it needed more time to consider its options.

However, when the FCC had previously considered its cross-ownership policies, it had counted not only broadcast stations in its assessment of how many independent voices there were in a market, but it had also included independently owned daily newspapers and cable systems as "voices" (FCC, 1999b). In that order, the FCC suggested that radio and television were to some degree substitutable for each other for diversity purposes, and that newspaper and cable systems also contributed to the diversity of voices in a community. When considering cross-ownership policies, the Commission said that public continued to rely on both radio and television for news and information, suggesting that the two media both contribute to the marketplace of ideas and compete in the same diversity market. The Commission also found that radio and television serve as substitutes, at least to some degree, for diversity purposes. Furthermore, the Commission concluded that newspapers and cable systems are important sources of news and information on issues of local concern and that they compete with radio and television, to some extent, as advertising outlets. Regarding cable systems, the Commission acknowledged that noncommercial, educational, and government channels present local informational and public affairs programming to the public in some markets.

While the FCC chose to count a wide array of media when assessing how many independent voices existed in a given market in its 1998 Biennial Regulatory Review Report, the FCC excluded all media outlets other than broadcast television in its enforcement of the Eight Voices Rule (FCC, 1999b). The position of the Commission was that despite the changes in the media environment since the Eight Voices Rule was promulgated, no empirical evidence available showed that other types of media were easily substituted for broadcast television. They argued that at least 20% of the population still did not have access to subscription services such as cable or satellite services, and that broadcast television had more impact on people than any other form of media. Additionally, according to the FCC, a vast majority of Americans still relied exclusively on broadcast television for locally originated programming including news and sports. However, in *Sinclair,* the FCC's attorneys claimed that most subscription services do not originate programming; they merely rebroadcast programming produced by local television stations. The FCC also argued that broadcast television was the only medium that was obligated to operate under public service regulations.

As for Sinclair's argument that the Eight Voices Rule violated the corporation's First Amendment rights, the FCC cited *NCCB v. FCC* and *Red Lion v. FCC* where the courts held that the First Amendment rights of viewers are paramount to the rights of station owners (*NCCB v. FCC*, 1978; *Red Lion v. FCC*, 1969; *Turner v. FCC*, 1994). In respect to Sinclair's argument that prohibiting the grandfathering in of previously existing local marketing agreements constituted an illegal taking, the FCC provided documentation that showed that the FCC had proclaimed that the existing agreements would be subject to negotiation 5 years after the Telecommunications Act of 1996 went into effect. It had specifically warned station owners that there would be no guarantee that those agreements would be honored past that period. The court took all of these arguments under advisement and did not issue its ruling until April 2002.

Fox Decided

On February 19, 2002, Chief Justice Douglas Ginsberg of the DC Court of Appeals issued the decision for the court in *Fox v. FCC*. The case was a consolidated challenge by five petitioners to the FCC's National Television Station Ownership Rule (NTSO) and the Cable/Broadcasting Cross-Ownership (CBCO) Rule (*Fox v. FCC*, 2002). The court concluded that the Commission's decision to retain the rules was, in fact, arbitrary and capricious and contrary to the law. Therefore, the court remanded the NTSO Rule back to the Commission for further consideration and vacated the ban on the CBCO Rule because it said that on remand, the Commission, in the court's judgment, would be unlikely to justify retaining it.

The main thrust of the court's opinion was that the FCC had failed to provide enough empirical evidence to support its retention of the NTSO and CBCO caps in its 1998 Biennial Regulatory Review Report (FCC, 1999b; *Fox v. FCC*, 2002). In other words, the rules were arbitrary and capricious according to the Administrative Procedures Act that compelled government agencies to provide adequate justification for rulemakings. According to Ginsberg, §202(h) of the Telecommunications Act mandated that the Commission repeal or modify any rules that no longer upheld the public interest as a result of competition. His opinion stated that the FCC provided no analysis of the state of competition in the television industry to justify its decision to uphold the national ownership cap. The opinion concluded that this oversight on the agency's part was contrary to the law. It was therefore not permissible for the FCC to adopt a wait-and-see approach to the problem; they were required by law to modify the rules every 2 years. Accordingly, the court ruled that because the FCC had failed to act in its 1998 Biennial Regulatory Review Report, Fox Television had suffered harm due to its inability to complete its purchase of the Chris-Craft that would have put them over the national ownership limit. Likewise, Viacom, another petitioner in the case, had suffered immediate and direct harm because of the Commission's stay in its purchase of CBS, which would have put Viacom's national ownership of television stations at 41%.

The reasoning the court provided for overturning the CBCO Rule was similar. The FCC had failed to meet its burden of proof here as well (*Fox v. FCC*, 2002). The FCC assertion that retaining the rule would prevent cable system operators from favoring their own stations and that the rule was necessary to promote diversity in local markets failed to persuade the court. Again, the court cited significant harm to Time Warner as a result of the ruling. Time Warner stated that it wished to purchase a television station in New York City, but it already owned a cable system there. According to Time Warner, its intent was to provide a 24-hour local news channel in New York City, a significant public service, but was prevented from doing so by the CBCO Rule. Time Warner also asserted that the CBCO hindered its ability to compete with its WB network and with other network-owned stations in major television markets.

The court asserted its jurisdiction in the matter, contrary to the FCC's claim that its rules in respect to ownership were only subject to review by Congress (*Fox v. FCC*, 2002; *Sinclair v. FCC*, 2002). In responding to the Commission's attorneys who argued that Congress had intended that the NTSO Rule remain fixed at 35%, the court's opinion stated that merely quoting from the remarks of the Telecommunications Act's sponsors did not show intent.

The court rejected the petitioners' claim that their First Amendment rights were abridged by both of the rules (*Fox v. FCC*, 2002). The opinion said that the Supreme Court had repeatedly upheld the FCC's obligation to consider the public interest in maintaining diverse and antagonistic sources of information with its rules. Nonetheless, the Court said it did not have the authority to overturn those precedents but hinted that the Supreme Court might decide to revisit the issue to reflect changes in the competitive broadcasting market sometime in the future.

While the court remanded the NTSO back to the FCC for further consideration, the opinion was a blistering attack on the Commission for its failure to provide empirical evidence to support its positions (Labaton, 2002b; "Student Note," 2002). The opinion also presumed that Congress had intended that the Commission abolish or modify rules that inhibited competition as a matter of course, rather than presuming that existing rules could be retained unless proof was offered that they would harm competitive forces in the television marketplace. The court interpreted §202(h) of the Telecommunications Act in a way that equated the public interest solely with competition. While the justices disregarded the Commission's contention that it had an equal responsibility to maintain diversity of outlets and diversity of voice in the national market, the opinion did not say that diversity no longer mattered under the Telecommunications Act of 1996. However, the opinion did say that the FCC had failed to provide justification for maintaining rules that promoted diversity. Nonetheless, in a telling move, the FCC under the direction of Powell decided not to appeal the court's decision to overturn the CBCO rule (McChesney, 2004a; Smith, 2003).

Sinclair Decided

Two months later, the same court in the District of Columbia handed down its decision in *Sinclair*. Justice Roberts wrote the opinion and began by citing the court's previous decision in *Fox v. FCC*, stating that the court had already decided that §202(h) of the Telecommunications Act of 1996 carried a presumption in favor of repealing or modifying media ownership rules (*Fox v. FCC*, 2002; *Sinclair v. FCC*, 2002). Again, the FCC attorneys argued that the court did not have jurisdiction to review its compliance with the Telecommunications Act, and again, the court disagreed. However, the court said "there is no unbridgeable First Amendment right comparable to the right of every individual to speak, write or publish" to hold a broadcast license and rejected Sinclair's claim that its First Amendment rights were being abridged by the Eight Voices Rule (*Red Lion v. U.S.,* 1969 at 388; *NCCB v. FCC*, 1978 at 799). The court also rejected Sinclair's

Fifth Amendment takings contention and its argument that local marketing agreements should be grandfathered in indefinitely. Noting that nothing in the Telecommunications Act addressed the grandfathering in of existing agreements, the court ruled in favor of the Commission.

However, the court remanded the Eight Voices Rule back to the FCC for further consideration, and as in its decision in *Fox*, the opinion stated that the Commission had failed to provide empirical evidence to suggest that the Eight Voices Rule preserved competition and/or diversity in local markets (*Sinclair v. FCC*, 2002). While Sinclair claimed that the FCC had plucked the number eight out of thin air, the court validated the Commission's decision to draw a line somewhere, as long as it was not arbitrary and capricious. However, because the agency failed to rationalize its decision, the Court stated that the rule was, in fact, arbitrary and capricious. Additionally, when the FCC determined the guidelines for the number of independent media in its cross-ownership rules by counting various forms of media, in the case of local ownership, it had only counted broadcast television outlets. The Court rejected the FCC argument that broadcast television was more immediate, more available, and used by more people as their primary source of local news and information because the agency had only provided one broad study that did not focus exclusively on local television. Again, the main thrust of the Court's opinion was that the FCC needed to provide more evidence to support its rulings.

Powell's Turn

In several addresses and interviews following the court's decisions in *Fox* and *Sinclair,* Powell repeatedly stated that all decisions rendered by the Commission must be based on empirical evidence (Powell, 2002a, 2002b; Pulley, 2002). He cited the MOWG studies as an example of the new initiatives the Commission was taking to gather the evidence necessary to support its media ownership decisions. Often, Powell reminded his audiences that he thought that newspapers and radio stations, as well as other forms of media, should have been counted when the FCC assessed the number of independent voices in a given television market.

In a panel discussion moderated by Sam Donaldson at the NAB convention in Las Vegas, Powell (2002a) told his audience that the telecommunications industry was in a state of transition brought on by fundamental changes in technology, public policy, and the marketplace. He said that the transition to digital broadcasting would benefit station owners if they could create programming that consumers were willing to pay for. When Donaldson asked Powell what he intended to do given the decisions by the court in the *Fox* and *Sinclair* cases, he replied that the Commission was aggressively seeking to cull the deficiencies in the FCC's media ownership policies so that they could find empirical evidence to support them. He also said, "I think that the Court is increasingly saying that you can't just come in here and invoke magic incantations and say 'almighty diversity' and you're done and the rule is sustainable" (Powell," 2002a, p. 2). Ironically, a year earlier, Powell had also referred to magical powers when he said "the public interest works with letting the market work its magic" (Shadid, 2001, p. 2). According to what Powell told Donaldson, the court was saying that the Commission could not make the argument that its policies were designed to promote diversity, if they did not include all voices in the market. Donaldson then asked Powell if limits on ownership were designed to preserve viewpoint diversity, and if the FCC decided to count all voices in the market, then how would he be able to defend the limits at all? Powell replied that he did not think the rules were defensible.

A month later, when Powell was speaking to the National Cable and Telecommunications Association and was asked to describe some examples from industries he was responsible for regulating that he considered to be healthy, competitive industries, he said,

> I believe in competition deeply, but I believe in healthy markets. You can get in heated debates about how many competitors constitute a market, how many don't. So, you can have healthy market conditions and even have fairly concentrated markets in some instances…. (Powell, 2002c, p.3)

Powell said he thought that the current media environment was fairly competitive, although concentrated in certain ways, and he saw nothing wrong with that. Overall, Powell said he would certainly ascribe it as a healthy market environment (2002c). He did not believe in a one-size-fits-all approach to media regulations, and he said that the problem with the ownership rules was not that the values the rules represented were not important but that the regulatory framework was rarely contextualized for modern changes in the market place in the context of competitiveness. He thought that it was intellectually dishonest to ignore those changes. Powell stated that he did not have a problem with a lot of the rules, and although he conceded that they were rooted in valuable concepts, he said the methodology behind them was flawed.

Finally, Powell said that he disliked the idea of doing analysis based on "stovepipes." He did not think that the idea that broadcasting should live in a separate universe from all other forms of media was realistic anymore.

> I think then, that there is a sort of philosophical struggle, which has been slippery and doesn't have a lot of precision: what do we really mean by diversity and viewpoint? And, I keep trying to struggle to get that down to its essence so the rules are really about something you can show. It can't mean copiousness. The media is more voluminous and available than in any time in history. So diverse, meaning plentiful, is difficult to argue….(Powell, 2002c, p.3)

The problem of how to achieve political diversity over the airwaves clearly presented a dilemma for Powell. When he equated political diversity with the abundance of "stovepipes," he was essentially saying that it did not matter who delivered the programming. Instead, the only thing that mattered was that there was a surfeit of content available to suit any individual's tastes. He refused to acknowledge that certain types of programming might be more valuable in terms of achieving political diversity than others. Powell's faith in technology to cure all ills, along with his belief in the magic of the marketplace, precluded him from understanding that the slippery philosophical struggle that had informed communications policy for decades, mattered to some citizens as much as any empirical evidence that the FCC could provide to the courts. Powell's failure to account for the arguments of those opposed to media consolidation on philosophical grounds would have disastrous results in the upcoming struggle over media ownership rules.

Notice of Proposed Rulemaking

On September 12, 2002, the FCC adopted a Notice of Proposed RuleMaking (NPRM) for its 2002 Biennial Regulatory Review (FCC, 2002f). The specific rules to be addressed were the Local Television Multiple Ownership Rule, the Radio/Television Cross-Ownership Rule, the National Television Ownership Rule, and the Dual Network Rule. The FCC released the NPRM to the public on September 23, and set a 90-day comment period following the release the MOWG studies. The deadline for submitting comments was set for December 2, and reply comments were due by January 2, 2003.

The NPRM laid out the legal framework for the Third Biennial Ownership Review and documented the history of regulatory review at the Commission following the passage of the Telecommunications Act of 1996. The NPRM also detailed recent reviews of the rules by the court (FCC, 2002e; FCC, 2002f). The writers of the document took pains to describe the modern media environment in terms of the numbers of video, audio, cable, newspaper, and Internet outlets available to most citizens. The Commission explained its policy goals as they related to diversity, competition, and localism. In doing so, the report made a strong case for the abundance of media outlets in the contemporary media market, but the Commission also solicited reply comments from concerned citizens and the industry about almost every conceivable aspect of the media ownership rules. Many of the questions were quite specific, others were focused more broadly, but repeatedly, the Commission asked that reply comments include empirical studies to back up claims. The NPRM served notice that the Commission intended to conduct the most comprehensive review of media ownership regulations in its history. By doing so, it was calling into question the entire foundation of its past policies.

In a concurring statement released with the NPRM, Commissioner Copps suggested that the review compelled the agency to undertake far ranging economic and market structure studies as well as to initiate studies of consumers ‘habits (Copps, 2002b). He urged Powell to commit significant resources and labor to the task, and suggested that the Commission hold public hearings on the issues. Copps expressed his reservations that the timing and tone of the NPRM might lead people to assume that the foregoing review had already been predetermined. Copps insisted it was not and asked citizens to comment on any issue that was of public interest even if it had not been specifically addressed in the NPRM. Commissioner Martin also issued a separate statement approving in part and concurring in part with the notice (Martin, 2002). Martin thought that the NPRM's description of the FCC's interpretation of §202(h) of the Telecommunications Act did not go far enough. The report invited commentary on what standard the Commission should apply to comply with its Congressional mandate, and Martin asserted that the court had already clearly defined the standard: what is necessary to the public interest is what is essential to the public interest.

As previously noted, the NPRM urged the industry and other interested parties to submit empirical data with their comments (FCC, 2002f). The fact that many members of the public who had an interest in commenting about these issues did not have the access or the means to conduct empirical studies could not have gone unnoticed by those who published the NPRM. As much as Powell would have liked to ignore or discount these unquantifiable issues, at this point, it remained to be seen if the public would stick to the parameters set by the NRPM.

Summary

When Congress and the FCC began to gradually deregulate broadcasting and telecommunications during the 1980s and beyond, the courts consistently upheld precedents that favored the rights of viewers and listeners to be exposed to a diverse array of antagonistic sources over the rights of broadcasters to expand their holdings (*NCCB v. FCC*, 1978; *Red Lion v. FCC*, 1969). The FCC generally interpreted this to mean that there should be rules that limited media ownership by one entity, locally, regionally, and nationally. While the Commission gradually loosened some ownership requirements over the latter part of the 20th century, it was not until the passage of the Telecommunications Act of 1996 that the interpretation of the public interest shifted to favor policies that encouraged the consolidation of all sectors of the telecommunications industry (Aufderheide, 1999; McChesney, 1999).

When legislators created the Telecommunications Act of 1996, they believed that the proliferation of new communications technologies made the old regulations obsolete (Aufderheide, 1999; McChesney, 1999; Price & Duffy, 1997). While many Democrats under the Clinton administration had supported the general concept of deregulating the telecommunications industry, many also expressed reservations about deregulating broadcasting (S. Rpt. No. 686, 1996; Streeter, 1996). If the act was written in order to spur the development of new technologies, a desire fueled by an almost religious obsession with the Internet and its promise, it also promoted massive consolidation in the telecommunications and broadcasting industries.

While the ability of the courts to interpret Congressional intent is often subject to debate, by the time the District of Columbia Court decided *Fox* and *Sinclair* it was obvious to most observers that the court interpreted §202(h) to mean that Congress had assumed that the section created a presumption that all regulations should be modified or eliminated if the rules impeded competition in the industry (Fallows, 2003; Hickey, 2003a; Labaton, 2002b). Competition was inferred to mean that companies should be able to enjoy the economic efficiencies available through consolidation, not necessarily competition between independently owned broadcasters in any given market. This presumption put the burden of proof on the FCC to establish that its ownership regulations did not impede competition, as that was deemed to be the primary foundation of the new definition of the public interest (*Fox v. FCC*, 2002; *Sinclair v. FCC*, 2002). While the DC Circuit Court explicitly stated that preserving diversity of outlets as well as voices was in and of itself a worthy goal, it also stated that the FCC had failed to provide evidence that its numerical limitations on media ownership would further those goals. The court's unwillingness to interpret Congressional intent when it passed the Telecommunications Act of 1996 as anything other than commanding the FCC to eliminate regulations that restrained corporations from consolidating their holdings in the communications industry was consistent with the political realities of the era. However, this interpretation ignored other aspects of the public interest, a phrase that was repeated in the Telecommunications Act of 1996 over 100 times (Aufderheide, 1999; Copps, 2002c).

Before the decisions in *Sinclair* and *Fox*, the DC Circuit Court had handed down other decisions that chastised the FCC for its lack of empirical evidence to support its cases. In 2001, the same court struck down the Commission's rules limiting the number of cable television systems that a company may own (Schiesel, 2002; *Time Warner v. FCC*, 2001). The same court struck down regulations related to telephone rates and wireless spectrum auctions. According to Andrew Jay Schwartzman, president of MAP, " the Commission [was] getting hammered in case after case manifesting a deep skepticism and distain for the FCC's decision-making process" (Labaton, 2001, p.2).

The Bush administration clearly favored the deregulation of telecommunications, and Powell had repeatedly expressed his desire to eliminate many of the rules that he was charged with defending in court (Labaton, 2002a; Powell, 2002b). Aside from independently owned broadcasters, the major players in the industry heralded the appointment of Powell and the subsequent decisions of the DC Circuit as new opportunities to expand their holdings. The broadcast and cable industry consistently argued that with all the new delivery systems becoming available to the public, they were losing their audience and therefore should be able to buy up more broadcasting and cable properties. Just as the Supreme Court interpreted the public interest in the Commission's rules to include the right to access diverse media voices from a plentiful array of sources, the DC Circuit interpreted the public interest to be equated with industry growth during the Bush administration.

Both the *Fox* case and the *Sinclair* case were challenges to the FCC's 1998 Biennial Regulatory Review Report that was directed by former FCC Chairman William Kennard. As previously noted, both Furchtgott-Roth and Powell have written vigorous dissents to the conclusions reached by the majority (FCC, 2000d). If Powell was disappointed by the court's decisions, he showed no signs of it; in fact, he had repeatedly taken a stance similar to the decisions in the past (Labaton, 2001). However, the decisions were also a mixed blessing for Powell. The high burden of proof that the court was demanding from the FCC made the task of defending rules that he did support much more difficult. The DC Circuit Court of Appeals was sending a clear message that the FCC could no longer evoke theoretical arguments that diversity of sources and outlets was good for democracy; now they would be required to prove it empirically.

Two weeks after issuing the NPRM, the Commission released the 12 MOWG studies. Critics immediately denounced many of them for employing flawed methodology and inaccurate assumptions (FCC, 2002d). When the studies were first released to the public, much of the underlying data on which they were based were considered to be proprietary, but after receiving numerous protests from the public, the FCC allowed academics and other interested parties to examine the data sets in Washington, DC by appointment. The following chapter examines the studies and the public's reaction to them.

CHAPTER 7

THE MEDIA OWNERSHIP WORKING GROUP STUDIES

When Chairman Powell launched his initiative to provide empirical data to support the FCC's media ownership regulations, he asked FCC staff members and other researchers to conduct 12 studies that were intended to provide empirical data to guide the Commission's evaluation of the media ownership rules (FCC, 2002g). The studies were also meant to provide the evidence needed to convince the courts that the FCC's decision-making process was based on rational determinations. However, the results of the Media Ownership Working Group (MOWG) studies were less than conclusive, and many critics dissected the methodology employed by the researchers and found it wanting. Even as some members of the trade press declared that the studies validated Powell's argument that the media ownership rules should be relaxed, a closer look at the data provided a much more tentative portrait of the conclusions. This chapter examines the strength and weaknesses of the studies and evaluates the findings drawn from the data.

MOWG Studies Released

On October 1, 2002, the FCC released the 12 MOWG studies to the public, along with a summary of the findings of each report (FCC, 2002g). The press release accompanying the summary said the objective of the initiative was to develop rules and policies that reflected the current media marketplace. Additionally, the research was designed to impart an analytically consistent framework for the agency's decision-making process. According to Powell,

> this effort is the most comprehensive look at media ownership regulation ever undertaken by the FCC. As the courts have made clear, it is critical that the FCC has a solid factual base to support its media ownership rules. Collectively, these studies represent an unprecedented data gathering effort to better understand market and consumer issues so that we may develop sound public policy. (FCC, 2002d, p.1)

Amid much industry speculation that the FCC would be relaxing, if not entirely eliminating, many of the six ownership rules under consideration, the reports were released 2 weeks after the official notice of proposed rulemaking was recorded (Davidson, 2002; Labaton, 2002b; Sanders, 2002; Shriver, 2002). Although some journalists reported that the studies supported Powell's contention that consolidation in the media was rendered essentially harmless in the face of more media options for consumers, a close reading of the data collected is much more ambiguous.

According to a report in *Mediaweek*, the studies showed that media outlets had proliferated since 1980, that network-operated and newspaper-owned television stations did a good job of providing news, and that consolidation in the radio business had led to lower rates for advertisers (Shields, 2002). The *Los Angeles Times*[3] reported that the studies offered support for Powell and large media companies that favored deregulation (Sanders, 2002). However, Jeff Chester, founder of the Center for Digital Democracy, questioned whether the studies offered an unbiased view of the media rules.

> The studies released today reveal a deeply flawed perspective that—while ratifying the Chairman's view—fails to adequately assess the realities of the news and entertainment media marketplace. A research agenda on this critical issue

[3] The Tribune Company owns several television stations and other media outlets.

> should be developed and conducted outside of the FCC—not with staffers who must please the Chairman. (Sanders, 2002, p. C2)

The remainder of this chapter will examine the conclusions reached by the researchers for each study.

Study # 1

Study #1 compared the number of media outlets and owners in 10 randomly selected markets in 1960, 1980, and 2000 (Roberts, Frenette, & Stevens, 2002). The FCC's summary of the report concluded that the number of radio stations, newspapers, cable systems, and direct broadcast satellite operators had increased by an average of 195% since 1960 (FCC, 2002f). The number of independent owners had increased by 139% during that same time period. On the surface, this finding appeared to support Powell's argument that Americans had more access to more media than ever before in history.

To the contrary, many critics claimed this study raised more questions than it answered. For example, Roberts et al. (2002) examined the number of media outlets and the number of station owners in 10 selected markets. Although these data indicated that there was indeed an increase in owners and outlets between 1960 and 2000, the statistics also showed that that the rate of increase in the number of outlets slowed substantially during the period 1980 and 2000 when many of the regulations regarding media consolidation were liberalized. In fact, the data showed that the growth in the number of outlets slowed in all markets examined, except for one, during the period between 1980-2000. Additionally, the rate of growth in the number of owners slowed in all 10 markets over the previous 20 years. While the study clearly demonstrated that there had been little or no growth in ownership or outlets over the past 20 years, the authors of the study made no effort to determine if the lack of growth coincided with changes in regulatory actions.

In his analysis and critique of the MOWG studies, Dean Baker, co-director of the Center for Economic and Policy Research, suggested that it would have been useful if Roberts et al. (2002) had incorporated data on market shares into their research. Baker (2002) asserted that when Roberts et al. merely counted the number of outlets in selected markets, the authors failed to provide much information about the range of choices available to consumers. Furthermore, if a small number of outlets dominated the market, the availability of many small outlets would not be a benefit to either consumers or advertisers since the reach of those outlets would be limited. Additionally, Roberts et al. failed to distinguish between the radio and television stations and instead counted both under a single category of broadcast outlets. Although the study did provide some useful information, it certainly did not provide a complete media analysis of the markets examined.

Study # 2

David Pritchard of the University of Wisconsin-Milwaukee conducted the second study, *Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign*. Pritchard's (2002) study posed the question of whether there was an overall slant in coverage favoring either of the 2000 presidential candidates that could be attributed to the common ownership of broadcasting stations and newspapers in the same market. Pritchard theorized that the extremely close race between Governor Bush and Vice President Gore offered an excellent set of conditions for the analysis of editorial slant in election coverage. Pritchard reasoned that since the FCC suspended the Personal Attack Rule and the Political Editorial Rule during the campaign that it was conceivable the suspension of both rules would have a liberating effect on the owners of cross-owned broadcast/newspaper combinations. Therefore, Pritchard assumed that cross-owned outlets would be more motivated to adopt a position in favor of one candidate or another.

However, several critics questioned Pritchard's (2002) evaluation of whether the conditions of the study were ideal (Baker, 2002; Cooper, 2003; Smith, 2003). In Pritchard's own one-page executive summary, he reported:

> The limited number of observations in this study *prevents us from drawing firm or sweeping conclusions about the implications of our findings*. However, for the markets studied, the data *suggest* that common ownership of a newspaper and television station in a community does not result in a predictable pattern of news coverage and commentary about important political events in commonly owned outlets. (Pritchard, 2002, p. 1, italics added)

Pritchard's (2002) sample size was small; he only analyzed 10 markets in which cross-owned newspapers and television stations existed before the ban was instituted that prohibited such arrangements in 1978. At the time of the study, there were 27 markets where there were cross-owned television/newspapers due to grandfathered arrangements or waivers from the FCC (Smith, 2003). Moreover, Pritchard never provided a rationale for the cities that had been selected for the study. Additionally, since the sample size was so small, it is difficult to extrapolate any meaningful generalizations to other instances of cross-ownership in other markets.

According to Pritchard (2002), the two key assumptions underlying his hypothesis were that Governor George Bush was thought to favor the relaxation or elimination of the Broadcast/Television Cross-Ownership Rule, and that Vice President Albert Gore favored retaining the rule. The second assumption was that the corporations that owned newspaper/broadcast combinations would also favor the elimination of the ban and that they would therefore endorse Bush across all of their outlets. Pritchard does not provide a persuasive rationale for starting with these assumptions; he only says that they were the foundation for his study.

In any case, Pritchard (2002) and his coders defined slanted coverage as any item about the presidential campaign from the hypothetical point of view of an interested yet undecided voter. If, in the researcher's judgment, an item made it more likely for an undecided voter to vote for Gore or a third-party candidate, then the item was coded as favorable to Gore and vice versa. Each item was categorized as favorable or unfavorable if it cast the candidate in a positive light. There was no attempt to evaluate whether an item was biased, nor was a determination of intent on the part of any journalist taken into account. The researchers coded all available nonadvertising content about the presidential campaign that was carried on the early evening news broadcasts. They evaluated news stories, editorials, editorial cartoons, staff-written opinion columns, syndicated opinion columns, guest opinion essays, letters to the editor, and freestanding photographs. The coders reported a high level of intercoder reliability at 92%.

The results showed that in 5 of the 10 newspaper/television combinations studied, there was a "noticeably" different slant on the campaign between newspapers and television stations that were commonly owned. There was no significant difference in the slant between the coverage of the campaign between the newspaper and television station coverage of the other five combinations studied. Pritchard (2002) concluded that this suggested there was no predictable pattern of news commentary or coverage of important political events in commonly owned outlets. Pritchard did not theorize about why some combinations may have rendered a similar slant on the election, but he did conclude his report by saying that in his judgment, cross-owned media covered the campaign in the same way that was typical of any other mainstream media outlet.

While Pritchard was careful to hedge his conclusions, other academics questioned his methodology (Baker, 2002; Cooper, 2003; Smith, 2003). As previously noted, it is impossible to determine whether or not the 10 companies selected for the study are representative of the 27 cross-owned newspaper and television outlets across the country. Eight of the 10 combinations studied were in large markets, and it is possible that combinations in smaller markets would have provided data contrary to Pritchard's conclusion. Another problem with his research design was the fact that Pritchard (2002) never attempted to compare his findings to independent media outlets. Pritchard's assertion that there was no difference in the coverage of cross-owned media with that of other mainstream media outlets is meaningless without a documented baseline for comparison.

Another error in Pritchard's (2002) study is that his conclusions are based on less than rigorous statistical analysis (Smith, 2003). It is generally accepted in social science research that a *p*-value of at least .05 is a statistically significant difference between two variables (Baxter & Babbie, 2004; Creswell, 2003). However, in several instances Pritchard described values of $p<.17$ as constituting a meaningful difference. According to Smith the differences between television stations' slant and newspapers' slant are significant in only 2 cases out of 10. Despite Pritchard's contention that common ownership of television and newspapers does not result in any particular pattern of coverage, in 80% of the cases he studied the slant between commonly owned news properties was not statistically significant. His study should therefore be considered preliminary at best. If the purpose of the study was to provide the FCC with the solid empirical evidence that the courts were demanding, this study was far from conclusive.

Study # 3

Study # 3, *Consumer Substitution Among Media,* was an effort by Joel Waldfogel of The Wharton School at the University of Pennsylvania to determine if the use of one medium by an individual affected the way an individual consumed another type of media (Waldfogel, 2002). The intent of the study may have been to test Powell's theory that an overall increase in different types of media-rendered FCC regulations such as the eight voices rule moot. If, as Powell had previously argued, news is news, no matter how it is delivered to the consumer, then treating each specific medium as an entity onto itself would no longer be rational. Thus, if Waldfogel's study demonstrated that there was complete substitutability between and across media, the existing regulatory structure that assumed that each medium was distinct could be called into question. Despite Waldfogel's efforts to sustain this hypothesis, he concluded:

> The conception of each medium as entirely distinct would be unduly restrictive because there is evidence (here and elsewhere) that consumers substitute across media. At the same time, however, substitution is not apparently so complete that the effects of changes in one medium are offset by changes in another to leave civic behavior unchanged. It is conventional and trite to conclude a study with a call for more research. Nonetheless, some of these questions will only be answered with additional research. (p. 41)

For the first part of his study, Waldfogel (2002) surveyed both the availability of media outlets and their use over time. He then aggregated the data in 144 designated market areas from BIA's Media Access Pro, Duncan's American Radio, the Current

Population Survey's Computer and Internet Use Supplements, Burrelle's Media Directory, and the U.S. Census in order to determine if the supply of outlets in each medium responded to a supply of outlets in other media. Waldfogel examined radio stations, television stations, cable systems, daily newspapers, weekly newspapers, and the Internet. As Waldfogel admitted, these are difficult questions to answer given the number of variables in each market and in the size of each market. For example, larger markets tend to have more media outlets than smaller ones because bigger markets can support more financially viable outlets. Waldfogel also points out that if consumers in one place develop an interest in a particular form of information, it could bring about a change in their use of multiple media.

Waldfogel (2002) found that there is a high level of substitutability within media categories. When a new radio station appears on the dial, it is likely that it will cipher off a considerable share of its audience from another radio station. Accordingly, this suggests that radio stations are close substitutes for each other (Berry & Waldfogel, 1999; Waldfogel). Likewise, in another study, George and Waldfogel (2003) found that when the *New York Times* became available daily in a market, its readers often substituted the *Times* for a local paper. Waldfogel concluded that the only substitutions that are significant at even a 10% confidence level are substitutions between access to radio outlets and cable use, access to radio news and Internet use, access to daily newspapers and cable use, and the circulation of daily newspapers and cable use (Baker, 2002; Smith, 2002; Waldfogel). There was no evidence of substitutability between cable and broadcast television, between the Internet and broadcast television, between newspaper and Internet usage, or between any other outlets. A ten percent level of confidence is quite low for an economic study (Baker, 2002).

For the second part of the study, Waldfogel (2002) attempted to answer the question of whether consumers perceive different media as substitutes for each other. Waldfogel examined cross-sectional data based on information on an individual's use of various media; the data set was based on approximately 180,000 observations. Again, Waldfogel qualified his conclusions by saying that "despite the substantial appeal of these data, consumption data have the drawback that individuals who use one medium heavily may also use others heavily" (p. 25). Accordingly, he used a regression analysis that controlled for age, education, race, and gender and found there was a substitution between Internet and broadcast television usage. Another regression measured the extent to which consumers substitute for news. Again, the only significant measure of substitutability was between the Internet and broadcast television.

While Waldfogel's (2002) study did provide some useful information, it also raised many questions. This kind of analysis necessarily produces averages of media usage. One person may view 10 hours of news programming on cable television each week, whereas another might view only 2. The average amount of cable news usage would then be 6 hours a week, which would lead to false assumptions about viewing habits. It is also possible that people who watch the evening news on television might then become more interested in a particular issue and would therefore seek out other sources of information about the subject. In other words, some individuals might view different news outlets as compliments to each other, not necessarily substitutes.

Additionally, there is the question of whether or not some subgroups of the population might more easily substitute one medium for another. At the time of the study, only 46% of the households examined had access to the Internet at home, school, or work (Waldfogel, 2002). That leaves approximately 54% of households who are unable to substitute the Internet for other more accessible news sources. While the Internet is generally offered free of charge in public libraries, it seems unlikely that a person without home access would substitute the Internet for other sources on a regular basis. One might also wonder if people who only had access to the Internet at work and school would utilize those connections for news on a regular basis when they are engaged, or supposed to be engaged, in their primary task of working and studying. Although the proportion of people with home Internet connections, especially those with access to broadband connections, might easily substitute online information for other news outlets, the results of this study are far from conclusive and show that any such substitution is not nearly complete.

Another issue with this study is that the research design only allowed Waldfogel (2002) to look at two forms of media at a time. In the real world, most people have more than two choices when they decide where to get their information (Smith, 2003). It is also the case that aggregate national data do not apply to local markets. The study also does not address the question of how people who watch local news on television access local stations. It is quite possible that people watch local news on cable or via satellite receivers, a possibility unaccounted for by the study. Additionally, there is a possibility that people may read the local newspaper via the Internet, rather than buying a paper copy. As Waldfogel stated repeatedly throughout his report that several limitations are inherent in his methodology. Waldfogel's research simply leaves too many unanswered questions to form the basis for a radical change in communication policy.

Study # 4

Keith Brown and George Williams (2002) conducted the fourth working group study, *Consolidation and Advertising Prices in Local Radio Markets*. The study was premised on two assumptions. The first was that if radio stations in consolidated markets could charge more for their advertising, consumers would benefit because the station could then reduce the number of advertisements it carried. The other assumption was that by specifically examining changes in radio markets since the passage of the Telecommunications Act of 1996, the researchers could then evaluate how the regulatory environment affected the price of advertising in local radio markets. Brown and Williams (2002) found that the inflation-adjusted cost of radio advertising from 1996 through 2001 rose by 68% (later amended to 60%) and that only 3 to 4% of that rise could be attributed to concentration in local markets.

Brown and Williams (2002) used a log of radio advertising prices, which was regressed against several variables. The variables studied were the population of the radio market, per capita income in the radio market, the gross national product, and the Herfindahl-Hirschman Index (HHI) that measures concentration in a market. Brown and Williams recognized some of the limitations of their study. For example, the advertising prices were aggregated by market, so they only reported national and regional advertising and did not account for local advertising time. The statistics also did not allow for idiosyncrasies in local markets, perhaps a very popular announcer or a long-standing relationship in the community. Brown and Williams did not attempt to control for differences between radio formats or play-lists or for locally originated programming versus national or syndicated programming. Nonetheless, the authors concluded that consolidation in local radio markets only accounted for a low, single digit rise in advertising prices out of an overall rise of 60%. The authors claimed that the 60% rise could be attributed to growth in the national economy that coincided with the rise of consolidation in radio.

This conclusion is problematic at best. In a study that examined the price of advertising in real terms over the period between 1961 through 1994, Silk, Klein, and Berndt (2002) found that radio advertising prices had been falling over the entire period on an average of 1.27% annually. Spot advertising rates fell on an average of .08% annually. The overall economy grew by 202.1% during this period. If, as the authors of Study 4 concluded, economic growth explained the rise in advertising rates since the wave of radio consolidation after 1996, economic growth does not account for the fact that rates fell during the time before the relaxation of ownership regulations, despite a 202.1% rise in the Gross Domestic Product during that period. It is also possible that local HHI measurements that rose by an average of 47% between 1994-2000, and the national HHI, which rose by 739%, account for more than the 3-4% out of 60% of the rise in rates for advertising in local radio markets. One can only make an educated guess about this issue since the data sets used for this study were proprietary and were only released for review and inspection for those who signed a protective order and made prior arrangements to do so at FCC headquarters at the time of this study’s release. This inspection agreement evolved while the clock on the comment period for the NPRM was running.

Study # 5

Mara Einstein of Queens College at City University of New York, wrote the fifth study, *Program Diversity and the Program Selection Process on Broadcast Network Television* (Einstein, 2002). This report was divided into two distinct sections. The first section utilized quantitative data to determine whether program diversity on network television had increased or decreased following the implementation of the Financial Syndication Rule (Fin-Syn). The second section of the study was based on qualitative data, depending largely on interviews with industry executives and producers and was designed to illuminate the program selection process.

The Fin-Syn Rule was enacted to prevent networks from discriminating against independent production houses in favor of their own in-house productions (FCC, 1993). The theory was that if a network owned most of its own programming, the diversity of programming available to viewers would decline. In the quantitative section of her study, Einstein (2002) used a number of different methods to categorize different types of programming. For the years 1947-1974, she used Sterling's (1984) taxonomy. Einstein's second set of categorizations was based on three different sources. Steiner (1963) had been commissioned by CBS to do a study based on how viewers watched television, and Einstein used his methods to categorize programming for the years between 1966-1974. The second source for Einstein's study was based on Dominick and Pearce's (1976) methodology that attempted to create a diversity index to examine which types of programming were most likely to dominate prime time television. Their methods were used by Einstein in her analysis of programming that aired from 1974-1989. The third taxonomy was based on the author's own investigation of prime time programming on the six major networks 1989 –2000. Einstein then studied the diversity of programming before the Fin-Syn Rule, the time when the rule was in effect, and for the years after the rule was repealed. She found that program diversity was at its peak in 1968-1970, the years before the Fin-Syn Rules went into effect. During this time, 11 of the top-20 program suppliers were independent production companies and the others were major studios. Together they accounted for 67% of network programming. The Fin-Syn Rule was relaxed in 1991, and again in 1993, and finally repealed in 1995. Einstein found that the period when programming was the least diverse was when the Fin-Syn Rule was in effect.

That, however, is not the end of the story. By the 1990s, Einstein (2002) could not even evaluate the source of the top-20 program producers, as there were no longer 20 individual producers to count. In 1995, she found that 15 producers supplied 81.6% of network programming, and by 2002 she could only measure 10 producers, including the networks themselves, who supplied 87.8% of prime time network programs. Still, Einstein concludes that by 2001, programming was at its highest level of diversity even though the industry was its highest level of concentration. At one point in the second section of her study, Einstein says that despite there being a small number of shows "that are very low-brow, taken as a whole the prime time schedule (currently) could be compared with the golden age of television" (Einstein, 2002b, p.47). This statement contradicts her findings. According to Einstein networks produce much more programming than ever before because of horizontal and vertical economies of scale. She also documents the network's preferences for producing programming that is lower in cost, for example, reality shows, game shows, newsmagazines, and comedies, over higher cost dramas and network produced or acquired feature length movies. Einstein also documents the increasing trend of the networks exacting substantial economic shares from the programs they do buy, or even from their own production divisions. Clearly, the networks control more of their programming than ever before, and while the argument can be made that categorically the programs are more diverse, it is much more difficult to argue that the quality of programming has never been better. None of the programmers or producers that she interviewed argued that we are entering into another golden age of television; rather programming trends discouraged most of them. Einstein herself said that " no one seems particularly pleased with the current system and several participants expressed concerns about the effect of the current system over program content" (p. 50). She quotes extensively from one television producer, Matt Williams, who expressed his desire to leave television and work in film instead. He explains that since the networks began to lose their audience shares to cable, they have been much more reluctant to take a chance on new ideas in programming. Since they are going for the lowest common denominator, they have become much more conservative and are reluctant to challenge their audiences in any way. There may be more categories of programming offered on network television than in the past, but no one in this study asserted that there are more categories of programming worth watching.

Study # 6

Cunningham and Alexander's (2002) study was an attempt to construct a theoretical model that predicts how broadcast media concentration affects the price and number of advertisements on the air and if those effects would impact both the opportunity costs and viewing habits of consumers. The model is predicated on the assumption that advertising raises the cost of consuming nonadvertising programming, since the more advertisements there are on a television station, the more time a viewer has to spend watching television to get to the nonadvertising content. This assumption implies that if there is an increased proportion of advertising, it will lead to a decrease in consumption of broadcasting material by a consumer.

Using this model, Cunningham and Alexander (2002) found that as the number of competitors for advertising dollars and viewers decrease, the proportion of time devoted to commercials increases. This increases the opportunity costs to consumers, and the model predicted that the price of advertising would increase as well. The authors then went on to describe a "switching-off" effect. They speculated that if consumers respond to increased advertising by spending less time viewing television (or listening to radio, etc.), then it might be possible that the price of advertising would fall despite the overall increase in the number of spots. If consumers only responded with a weaker "switching-off" behavior, whereby viewership falls, but not enough to offset the greater amounts of advertisements, then the model predicts that the total amount of advertising in a concentrated market will still increase the proportion of advertising to nonadvertising content.

In either of these scenarios, the net effect of concentration in broadcast media would have a negative effect for both consumers and advertisers (Baker, 2002). The opportunity cost, or time spent with broadcast media, would have to increase because there would be more advertising to watch in order to get to the desired programming. Depending on how strongly the consumer reacts to the rising proportion of commercials, the price of advertising will go up as concentration goes up, even though consumption falls. While the model does not specifically address how much prices will rise because of the difficulty of predicting specific consumer behavior, Cunningham and Alexander do theorize that as broadcast media concentration increases, advertising costs will also increase. This study suggests that it is reasonable to assume that consolidation is good for media owners but bad for consumers and advertisers on this basis alone.

Study # 7

Four FCC staff members, Spavins, Denison, Roberts, and Frenette (2002) conducted Study # 7, *The Measurement of Local Television News and Public Affairs Programs*. Ostensibly, the purpose of the study was to determine if network owned and operated (O&O) television stations and cross-owned newspaper/television stations produced higher quality news and public affairs programming than network affiliates. The underlying assumption was that if in fact O&Os and cross-owned stations did provide better quality programming, then the rationale for reducing or eliminating national caps on broadcast ownership could be justified.

Spavins et al. (2002) defined quality in news and public affairs programs in four ways. They examined Nielsen ratings during one sweeps week in November 2000 for 106 stations from 26 top-50 markets and another 24 stations from 6 DMAs in the 54-177 range (Smith, 2003). The second measure of quality applied to these stations was determined by tabulating the number of awards each station received from the Radio and

Television News Directors Association (RTNDA). These awards are only granted to stations in the top-50 markets. The researchers also measured how many local recipients received the Silver Baton of the A.I. Dupont Awards from Columbia School of Journalism. Finally, Spavins et al. tallied the number of hours devoted to news and public affairs programs throughout the sweeps week on the stations they examined. The authors restricted their study to markets with at least one O&O and at least one affiliate of a network. They examined the ratings for the 5:30 and 6:00 p.m. local evening newscasts and reported them in unweighted averages. As Smith points out, reporting pure numbers, percentage, or indices does not explain what the numbers mean or if the differences between stations were statistically significant

According to Baker (2002), greater concentration in a market provides more pressures on other stations to reduce expenditures on news operations in order to contain the cost of production. Therefore, counting the number of hours of news and public affairs programming may not be a good way to measure quality or depth. Spavins et al. (2002) admitted that the "categorization process invites the possibility of error," but they asserted that any errors would be insignificant (p.2). The authors themselves never examined any of the actual content of these programs; most of their information came from outside reporting agencies. It may also be noteworthy that local news producers may offer more programming outputs during sweeps weeks in order to increase their ratings and enable them to raise the price of advertising on their evening news broadcasts. Additionally, Spavins et al. made no allowances for the many affiliates in local markets that are owned by large established media groups such as Gannett, Belo, Media General, and Hearst Argyle (Smith, 2003). Conceivably, these affiliates have the resources to produce the same type of quality news programming that O&Os do; in fact one wonders why the researchers expected to find any major differences in quality between these stations in the first place.

There are also several other problems associated with using Nielsen ratings to determine how viewers evaluate quality in local news. First, there is the issue of measuring only the ratings for the 5:30 and 6:00 p.m. newscasts. While many stations on the East Coast may pour most of their resources into these early evening shows, others in the Rocky Mountain and West Coast time zones emphasize the 10:00 p.m. local newscast (Smith, 2003). This variable could conceivably skew the results. Additionally, there is no way of knowing if more people watch a particular news program because of the programming that leads into or out of it. The popularity of a particular newscast can also be dependent on other variables such as if the anchor has a pleasing appearance or personality of an anchor, if the station had long-term ties to its community, or if viewers simply habitually tune in to that particular station. The Nielsen ratings may be a good way to measure a newscast's popularity at a given point in time, but ratings do not measure quality programming. It would have been more useful if the researchers had studied ratings using time series data (Cooper, 2003). If they had done so, the researchers might have been able to determine if a station's ratings improved or declined after becoming an O&O or part of a cross-owned group over time. Additionally, many news operations rely on consultants who advise management how to attract and retain the largest audiences. Human interest stories often attract viewers, but stories about cats rescued from trees might attract viewers but are surely not the type of quality news reports that would enlighten members of a given community.

As far as using awards to measure the quality of a station's newscast, awards are an imperfect measure at best. Some of the stations included in the study did not qualify for the RTNDA awards because they were not in the top-50 markets (Smith, 2003). Although the RTNDA and Dupont Awards are prestigious and well respected, like any other interpretive community their members develop a particular worldview or definitions of quality that may not be aligned with persons outside of that particular community (Fish, 1980; Streeter, 1996). These types of awards can also become normative in that they are given to those who judge quality by the standard of what they think the public should want. Smith points out that a particular company may not value awards. A station that wishes to compete for these awards must allocate personnel and the time required to pull together their entries and provide for entry fees. It would have been much more valuable for Spavins et al. (2002) to actually speak to people who watch the top-rated newscasts to see how they evaluate the quality of evening newscasts in their communities.

In summary, the claim of Spavin et al. (2002) that O&O stations win more awards than affiliated stations does not support the claim that O&Os produce higher quality news programs. The authors' findings that on average O&Os appear to produce a greater quantity of news and public affairs programming is also suspect, and the claim that cross-owned affiliates win more awards and carry more news and public affairs programming is highly overrated.

Study # 8

The FCC commissioned a survey from Nielsen Media Research to ask consumers how they viewed the substitutability of different types of media. Unlike Waldfogel's

(2002) study that found that there was little evidence of media substitutability, Nielsen (2002) designed a computer-assisted, telephone survey to collect data. The findings appear to show greater evidence of substitutability than Waldfogel's study did. The survey asked consumers directly about their usage of various media and how they might choose to substitute one form of media for another in order to obtain local and national news. In one series of questions, the survey asked respondents that said their main source of news was a local daily newspaper, what they would do if that paper were no longer available. Of these respondents, 66% said that they would be very likely to increase their use of broadcast television, 54% said they would watch more news on cable, 40% said they would be more likely to listen to more news on the radio, and 36% said they would resort to reading a local weekly newspaper. The survey found that 57% of the respondents use broadcast television as their primary source for news, 23% used newspapers, 10% used radio, 6% used the Internet, and 4% used other sources as their primary source of news. When Nielsen (2002) asked respondents what their primary source of local news was, 43% of the respondents said television, 31% said newspapers, 17% said radio, and 9% said the Internet was their primary source of local news. Only 10% of the people surveyed who subscribed to cable said they used local cable television stations as their primary source of local news.

When people were asked if they intended to use more television, cable, daily newspapers, radio, weekly newspapers, magazines and the Internet in the future. The data clearly show that during the period of August 23-September 1 and September 3-5, 2002, large numbers of consumers were still using broadcast media and newspapers as their primary source for both local and national news. The following table summarizes how they responded.

The data clearly show that during the period of August 23-September 1 and September 1 and September 3-5 2002, large numbers of consumers were still using broadcast media and newspapers as their primary source for both local and national news.

Nonetheless, telephone surveys are limited in that the information gathered can be inaccurate in many ways (Tuckel & O'Neill, 2002). Nielsen's sample was taken from households that had previously filled out diaries for the February 2002 and May 2002 measurement period and the research company did not state how the diary households were originally selected. Additionally, no estimates of sampling errors were reported. The study did not provide an estimate of the number of households who had Internet or

Table-Expected Changes in Usage for News

	More Often	Less Often	Same	Current Usage
TV-broadcast	18.2	5.7	75.2	59.8
TV-cable	21.8	8.5	68.2	52.2
Daily newspaper	15.8	9.4	74	56.4
Weekly newspaper	10.1	15.7	72.5	24.2
Internet	24.7	16.4	54.5	18.8
Magazines	5.3	24.4	67.6	6.4

(Nielsen Media Research, 2002, Tables 007, 008, 070-076; Baker, 2000) cable connections or who may or may not have had subscriptions to other forms of media. In the limitations section of the study, Nielsen (2002) states that the sample is not a perfect probability sample because of the number of household that did not answer their phone or who refused to participate in the study. There is the possibility of response error because despite the best efforts to train surveyors, callers can inadvertently influence the responses of those polled and people are sometimes unwilling or unable to respond to certain questions. Additionally, many of the survey questions asked people to recall how they used different forms of media over the past 7 days, and it is sometimes difficult for people to remember the amount of time spent listening to the radio, for example, or which newscast they watched on any given day.

However, the biggest problem with this survey concerns questions about substitutability (Baker 2002). Respondents were asked to predict their future behavior. People often report the way they wish to behave in the future, rather than how they actually do behave in a given time period. The fact remains that a majority of Americans still use local television stations as their primary source of news, and there is no way of predicting how much or how little that might change in the future.

Study # 9

The Telecommunications Act of 1996 greatly relaxed the number of radio stations that a single entity could own within local markets. The act allowed a single corporation to own up to 8 radio stations in a local market with 45 or more stations, 7 stations in markets where there were 30-44 commercial stations, 6 stations in a market with 15-29 radio stations, and 5 stations in markets with fewer than 15 stations. The act also eliminated all national caps on radio station ownership. In the years following the relaxation of these rules, there was a massive restructuring of radio markets with increased consolidation and with almost half of all stations changing hands over the next 2 years (Aufderheide, 1999; McChesney, 1999).

The authors of Study # 9 examined how radio market structure affects music diversity (Williams, Brown, & Alexander, 2002). This study was an attempt to understand whether claims that radio has become excessively homogenized across the country were valid. Previous studies attempted to measure diversity in a given radio market by counting the number of formats available in one designated market area. However, Williams et al. (2002) reasoned that since many radio formats play songs that are common to many different format categories, a better measure of musical diversity in a market would be to count the number of different songs played by each radio station in one locality. Williams et al. obtained listings from *Radio and Records,* a trade magazine, of the top songs played by a large sample of radio stations in March 1996 and March 2001. The authors found modest decreases overall in the actual number of songs on stations categorized under the same format by *Radio and Records* and slight rise in the amount of diversity of songs on stations listed under the same format within local markets. However, Williams et al. also state that their results are tentative and that they can make no definitive statement regarding the relationship between concentration and diversity from the study.

There are many reasons for their tentative conclusions. Williams et al. (2002) did not have access to the actual play-lists of the stations they studied; rather they relied on the lists of songs the stations reported to *Radio and Records*. This particular magazine and website only lists stations that meet a minimum rating requirement. This means that the sample stations were only taken from the top-tier markets, which may presumably operate in a more competitive environment than radio stations in smaller markets with fewer potential listeners to draw from (A. Columbo, personal communication, April 17, 2007). Therefore, the sample may not be a representative one. Additionally *Radio and Records* only reports new songs, so that stations that keep the same song on their play-list for weeks at a time are not accounted for. Finally, *Radio and Records* does not issue reports for stations that play older songs, so stations with formats such as Classic Rock, Oldies, or Classical, for example, are not counted.

While it might have been impractical to try to obtain the actual play-lists from a random sample of radio stations in a variety of markets, it would have substantially improved the degree of certainty about the implications of the data gathered by Williams et al. (2002). Although the authors concentrated on creating a new statistical measurement that they call “The Distance Measure of Diversity,” there is no way of knowing how many of the songs reported to *Radio and Records* were repeated over any specific day part, week, or month on the same station. All that can be ascertained is if a station reported adding a new song over the 2 weeks that were compared. This study also failed to focus on markets that were specifically affected by the changes brought about by the Telecommunications Act of 1996, so it is impossible to determine if the changes that they did measure were due to factors external to the change in regulations.

The Future of Music Coalition, an alliance of artists rights groups, the Media Access Project, and the Rockefeller Foundation commissioned the Behavior Research Center, a private research firm, to conduct a public opinion survey to measure consumer satisfaction with commercial radio (Dicola &Thomson, 2002). The firm surveyed 500 randomly selected respondents nationwide by telephone between May13 and May 20, 2002. The error factor for the survey was plus or minus 4.5%. Seventy-eight percent of those surveyed said that they would rather hear programming with longer play-lists, e.g., more songs, than they heard on radio stations at the time of the survey. Fifty-two percent of those surveyed said that less repetition and more new music or more local acts would most likely make radio more appealing (Holson, 2002). The study also found that time spent listening to radio was at a 27-year low. According to Duncan's American Radio, "the %age of the U.S. population listening to the radio in any average quarter-hour has experienced a near 17% drop in listening over the last 13 years" (Dicola &Thomson, p.4). While the statistical analysis conducted by Williams et al. (2002) may have been accurate despite its limitations, it is clear that the people who do listen to radio perceive it to be less diverse and more repetitive than they had in the past. Study 9 simply did not account for repetition; it counted the number of songs reported to have been added by different stations in large markets.

Study #10

The tenth MOWG study, *On the Substitutability of Local Newspaper, Radio, and Television Advertising in Local Media Sales*, examined whether newspaper, radio, and television outlets were considered substitutes for each other (Bush, 2002). The study found that there was little evidence of substitutability between the examined media for local businesses. Bush's statistical analysis showed that local business people used different types of media to reach their targeted audiences. These advertisers considered local radio, television, and newspapers to be complements of each other, not substitutes.

Bush (2002) gathered his data from a random sample of designated market areas (DMA) compiled by BIA Publication's Master Access Database in 2001. He also obtained revenue data from the National Newspaper Association of America to conduct his statistical analysis. Bush states that there were limitations to the data he collected. For example, BIA does not report all radio revenue in designated market areas; just the top rated station's revue. The retail newspaper advertising expenditures only count a DMA's share of the population over 16. However, Bush also states that the conclusions reached in his report are consistent with economic theory.

Although he did not examine if cable television or other advertising vehicles such as billboards or direct mail enter into the mix when advertisers decide where to spend their promotional dollars, it is reasonable to assume that the three media Bush (2002) did examine do compete with each other for advertising dollars. This study shows that there are several distinct markets operating within a given DMA, rather than one single media market. Therefore, this study suggests that a diverse array of local media markets is beneficial for advertisers.

Study # 11

Study #11, written by Williams and Roberts (2002), examined changes in the radio industry since the passage of the Telecommunications Act of 1996 through March 2002. Its focus was primarily on trends in ownership, format, and finance in the industry. If Powell was looking for data to support his contention that the effects of consolidation due to the relaxation of ownership restrictions had little effect on diversification in the radio industry, he must have been disappointed by the conclusions reached in this report.

The authors found that while there had been an overall increase of 5.4% in the number of radio stations on the air between March 1996 and March 2002, the number of radio station owners declined by 35% during that 6-year period (Williams & Roberts, 2002). The ownership of about 20% of the radio stations had changed hands over the 6-year period. The study concluded that the reason for the decline of owners was due to mergers between existing firms in the industry. By March 2002, the leading radio group, Clear Channel Communications, owned 1200 radio stations, up from 65 stations in 1996. The second largest group owner, Cumulus Broadcasting Inc., held 250 stations, also up from 65 stations in 1996. In March 2002 there were 50 radio station owners who held 20 or more stations, compared to 25 in March 1996.

The same trend was evident in local Arbitron Metro markets (Williams & Roberts, 2002). The largest firm in each metro market studied had on average 47% of the market's total advertising revenue, with the top two firms controlling an average 74% of the revenue generated in each of the 285 markets counted by Arbitron. Williams and Roberts noted that the number of radio formats available to consumers did not change appreciatively over the 6 years studied, but in recent years there had been a slight decline in the number of distinct formats offered in the largest radio markets with a slight increase in smaller markets.

The authors of Study 11 made use of various databases to compile their statistics; they used the BIA MasterAccess Database of radio stations and adjusted them to reflect sales listed as "pending," so that only transactions that were actually completed at the time of the study were counted for the report. The authors also counted stations that are part of local marketing agreements (LMAs) as separate stations, whereas BIA lists them together. Williams and Roberts (2002) split the news/sports format used by BIA into two different categories, and they assigned the approximately 25% of stations not counted by BMI a value of zero since these stations are usually the lowest rated stations in the market. Additionally, Williams and Roberts used data compiled by Arbitron, which measures audiences in 285 metro markets to reflect the number of listeners reached by local markets. These figures only represent about 60% of commercially licensed stations in the U.S., but represent a population that includes 75% of the United States population that is over 12 years of age.

Williams and Roberts' (2002) analysis of the financial condition of publicly traded companies whose largest business was radio broadcasting reflected strong earnings in the industry although they noted that many of those companies carried heavy debt loads that contributed to fluctuations in stock market valuations. Quarterly gross profit margins for publicly traded radio broadcasting companies were greater than gross profit margins measured by Standard and Poor's 500 index in 16 out of the last 26 quarters measured. Overall, radio station owners had shown very strong financial performances since the passage of the Telecommunications Act of 1996. While Williams and Roberts studied other measurements of broadcaster's financial performance and found that the debt ratio to earnings was higher in the radio industry than in other publicly traded companies, they also concluded that most radio owners, by all measures, performed better than the average company listed on the S&P 500.

Since 1998, Williams and Roberts (2002) found that the average number of radio listeners had declined by approximately 3.5% over the past 3 years, and according to Arbitron, radio listeners continued to turn off the dial at an average rate of 1% a year. The authors did not speculate on the cause of the decline. At the same time consumers were turning off their radios, the average price of radio advertising rose almost 90% from the rates being charged in March 1996. During that same time, the Consumer Price Index only rose by 16%. Although the authors concluded that advertising prices increased dramatically more than inflation since the 1996 Telecommunications Act, they acknowledged that although consolidation is one possible reason for the rise, they were not ready to make that conclusion based on the data analyzed. However, this conclusion would be consistent with the findings of Cunningham and Alexander (2002) in Study #6.

At one point, Williams and Roberts (2002) remark that "traditionally, the Commission has been concerned with encouraging diversity in the ownership of broadcast stations so as to foster a diversity of viewpoints in the programming presented over the airwaves" (Williams and Roberts, p. 7). If one were to evaluate the results of this study based on this criterion alone, national radio ownership policies that were adopted after the passage of the Telecommunications Act of 1996 are a dismal failure. Although the number of commercially licensed radio stations has risen, the number of independent owners has declined substantially. While the number of stations in local markets has also risen, the number of locally owned stations has fallen. It may be a matter of debate if the number of unique radio station formats has declined over the period of this study, but there is no question that the number of people listening to radio has fallen off since the Telecommunications Act of 1996, despite the fact that revenue from radio advertising has increased. Even as the top two station owners in most markets continue to garner an average of 74% of the revenue collected in both large and small markets, the rates generated for that advertising have risen astronomically. This study clearly shows that the relaxation in radio ownership limits on a national and local basis has benefited the biggest players in the industry.

Study # 12

For Study #12, *Broadcast Television: Survivor in a Sea of Competition*, Levy, Ford-Livene, and Levine (2002) updated a previous working paper written in 1991 that was a wide-ranging assessment of the broadcast television industry (Setzer & Levy, 1991). Levy et al. wanted to see if the predictions about the decline of broadcast television made in 1991 were accurate. The authors of the 2002 report studied audience shares, advertising revenue, and the profitability of the television networks and individual stations. Levy et al. supplemented that information with interviews with network staff, analysts, and advertisers. Levy et al. concluded that despite the dire prediction in 1991 that broadcast television was suffering from an irreversible long-term decline in audience and revenue share, the industry was quite healthy financially in 2002. While the updated report clearly showed that broadcast television was losing its audience share to other forms of video distribution, its gross revenue actually increased in real terms over the 11 years since the first report was issued.

While Levy et al. (2002) found that the industry itself was larger than it had been in 1991, with more stations and more networks on the air, broadcasters had adopted many strategies to cope with increasing competition from subscription-based services and other video outlets. One primary reason that broadcast television had continued to be a profitable business is that even as audience share has fallen, the networks are still able to pull in a much bigger share of the audience than any other individual video channel. On average, the major broadcast networks reached audiences that were over nine times the size of any cable network's audience. Not only did broadcast networks reach a bigger audience, but that audience was a national one. If an advertiser wanted to reach a national audience equivalent to a broadcast network audience via cable television, the advertiser would have had to buy time across multiple cable networks, and still would not have necessarily reached an unduplicated audience.

Additionally, broadcast television increased the number of commercials it ran during most day-parts. Levy et al. (2002) reported that the big four commercial networks had increased hourly commercial minutes by 16.4% from 1991. The networks had also increased the cost of reaching a thousand members of the audience (CPM) during prime time from $9.74 in 1990 to $13.42 in 2000, an average growth rate of 3.8%. In addition, the networks cut production costs by running less expensive programming such as reality TV shows and had cut back on offering expensive sports shows. Since the repeal of the Fin-Syn Rule, broadcast networks have been able to produce more programming in-house, therefore retaining economies of scale and future syndication rights. Another network strategy that kept broadcasting profitable was the art of repurposing programming. Since the big four commercial broadcast networks own cable stations, they often run their broadcasting programs on cable, and were able to sell advertising spots on the same program more than once.

Levy et al. (2002) also found that the rate of growth for cable and other forms of video distribution was flattening out. Cable systems had most likely attained a maximum level of penetration, and the authors of this study predicted that DBS and other newer technologies would also see modest rises in growth in the future. Additionally, Levy et al. (2002) predicted that digital television might bring new streams of revenue to broadcasters. One of the biggest threats to broadcasters, according to the authors, was the increase in consumer use of digital audio recorders like TIVO that allows users to fast-forward through commercials. However, television executives had already developed product placement deals that incorporate products into programming in order to offset this issue.

Levy et al. (2002) predicted that broadcasters would continue to face increased competition from the Internet, but the relative lack of broadband connections capable of delivering video content quickly will keep the competition to broadcasters from the web down to manageable levels. Overall, although the competition for audience share will continue to be fierce, the authors concluded that the television industry still provided the most popular and widely viewed programming available. In their conclusion, Levy et al. wrote, " the future of broadcasting will depend on its ability to continue to provide valuable programming on a cost-effective basis and to respond to the challenges and grasp the opportunities that new technology has to offer" (p. 139).

Summary

Although Powell repeatedly stated that the MOWG studies represented the most comprehensive effort by the agency to provide empirical data that would support the FCC's decisions on media ownership in court, the studies were in many cases based on flawed methodologies and unwarranted assumptions (Baker, 2002; Cooper, 2003; Smith, 2003). Additionally, the researcher's findings were less than conclusive. When the FCC finally released its memorandum and order relaxing many of the ownership restrictions for which the studies were designed to provide supporting evidence, the Commission largely abandoned the MOWG studies. Instead, Powell substituted the studies with a new "Diversity Index" that purported to measure consolidation in broadcasting. The Diversity Index was a variation of the HHI test that is used to measure consolidation by the Department of Justice. However, Powell did not allow the public to examine the new measurement tool until after the Third Biennial Review Report was issued. In fact, the two Democratic members of the Commission did not have access to the Index until 3 weeks before the vote (McChesney, 2004a).

After the MOWG studies were released, public opposition to the possibility that the media ownership rules would be relaxed intensified. The next 7 months would be marked by Congressional inquiries, one official hearing, and many off-the-record public input sessions culminating in the Commission's decision to relax most of the rules under consideration in its Third Biennial Review that June.

However, even if the MOWG studies had been executed flawlessly and even if the conclusions reached by the researchers had been unquestionably valid, the narrow scope of the analysis used to address the issue of media consolidation was seen as illegitimate by some of the stakeholders in the regulatory process. Although regulators, the courts, and the industry itself had long relied on neoliberal economic data to support their policy decisions, many members of the general public and advocacy groups saw media consolidation as a social problem that impeded the political process.

When Powell launched his initiative to provide "the most comprehensive look at media ownership regulation ever undertaken in the history of the FCC," his intentions may have been honorable (FCC, 2002d, p.1). However, the MOWG studies failed to achieve his goal. The studies were predominantly focused on the economic ramifications of media policy. When Powell directed researchers to confine themselves to this narrow scope of inquiry, he may have been asking the questions that were acceptable to his interpretive community. However, other communities of interest had different questions that they wanted answered. The following chapter addresses some of those questions.

CHAPTER 8

OPPOSITION MOUNTS

From the beginning of his tenure at the FCC, Chairman Michael Powell was an articulate spokesman for his position that the FCC was compelled by statutory requirements to eliminate or modify any media ownership rules that were no longer valid in the face of the changing character of the competitive marketplace (Fallows, 2003; Hickey, 2003a). Powell was convinced that the ability of broadcasters to compete in a marketplace purportedly saturated with new video and information services was hampered by outdated media ownership rules. He equated the public interest with the ability of media corporations to survive in a sea of competition.

At least one other Commissioner construed the statutory requirements of the Telecommunications Act of 1996 differently. Commissioner Michael Copps interpreted §202(h) to mean that the FCC was compelled to act in the public interest as the conditions of the competitive marketplace changed due to the transformative effects of the Telecommunications Act (FCC, 2002a; Hearn, 2001; McConnell, 2001b). Copps focused on the public interest aspects of the clause and repeatedly stated that the public was ill served by the increased consolidation in media that had occurred since the 1996 act passed. Although Copps was quick to acknowledge that the court was demanding that the FCC provide empirical evidence to back up the claim that certain regulations existed to serve the public interest, he was not satisfied with the MOWG studies, and believed that the public should decide what was in its own best interest (Copps, 2002a). Copps too was an articulate representative for his position. As he began to press his point in the public arena, tension between himself and the chairman began to strain their relationship.

Copps Alarmed and Disappointed

Before Jonathon Adelstein was finally confirmed to the FCC in December 2002, Commissioner Copps was the lone voice of opposition to media concentration on the Commission (Labaton, 2002d; McConnell, 2001; Mundy, 2003a; Sanders, 2002). Copps consistently expressed his concerns about increasing media consolidation and emphasized his position that relaxing regulations would be especially harmful in the arena of local news and public affairs programming. In mid-2002, Copps asked Chairman Powell to hold public hearings before making any determination about the media ownership rules (FCC, 2003b; "FCC Commish," 2002; McConnell, 2002a). He urged his fellow commissioners not to act too quickly and said that once the decision was made to deregulate the rules further, the FCC would never be able to revert to its previous regulatory regime. Copps insisted that the decision to allow more concentration in media ownership was a momentous one, one that should not be made without consulting the American people.

Copps believed that public hearings would provide important evidence to support any decision made by the FCC (Copps, 2002a, 2002c, 2003e). He suggested that the FCC hold hearings in small, medium, and midsize markets where existing cross-ownership arrangements had been grandfathered in to determine the effects on the citizens who resided in those places. He maintained that the FCC should reach out to interested parties including minority broadcasters, creative artists, consumer groups, and unions.

However, when union representatives urged Kenneth Ferree, the chief of the task force at the FCC studying ownership rules, to hold public hearings, he rejected the idea. He said that field hearings would only be an exercise in foot stomping (Labaton, 2002c; McConnell, 2002a). Copps disagreed and threatened to hold his own unofficial hearings beginning in New York and Los Angeles in early January. At first, Powell declined to accept Copps' invitation to hold field hearings, with or without the FCC, and said he needed to focus on developing the economic rationale for the rules demanded by the courts (Shields, 2002b). Although Powell and Ferree were not amenable to Copps' pleas, the other commissioners were. Despite the fact that only a few newspapers and broadcast outlets were providing coverage of the issue, Copps was getting a fair amount of press in trade publications (Layton & Cirillo, 2003). As the pressure on Powell to hold hearings intensified, he finally relented and announced that the FCC would hold a single public hearing in Richmond, Virginia, sometime in February (FCC, 2003h; Halonen, 2002; McConnell, 2002b).

Copps immediately issued a press release stating that the Richmond hearing would be a good step forward (FCC, 2002a). However, Copps also said that he thought more than one hearing should be held.

> We need to have other hearings in diverse venues to flesh out the record needed for this single most important decision the Commission will make next year. That means listening not just to one community, but giving Mid-Western and West Coast Americans, for example, access to the FCC. I understand budget constraints but on an issue of this profound importance, we just have to find a way to hear from more folks outside the Capital Beltway. I am looking for that way and I am determined to find it. (FCC, 2002a, p.1)

An editorial in *Broadcasting & Cable* declared that Powell chose Richmond as the location for the hearing because the FCC was under severe financial restraints ("Onward to Richmond," 2002). Richmond's proximity to the capital would save money because participants from the FCC could drive to Virginia, therefore avoiding the costs of airline tickets and hotel rooms. The editorial went on to question the need for the Richmond hearings or any other hearings at all.

> Does Copps really think that people in the provinces think much about media consolidation? At best, what you will get in any given town are local fronts for the Washington lobbyists and groups that spend their lives grappling with the issues. In Richmond, you probably would be able to stir up a better discussion on McClellan's Peninsula Campaign of 1862 than you will on the Telecommunications Act of 1996. ("Onward to Richmond," 2002, p.50)

Other trade journals echoed the sentiment that most citizens did not care about FCC regulations and that even if field hearings were scheduled, no one would show up (Halonen, 2002; McConnell, 2002b). This would prove to be a gross miscalculation.

As previously noted, the FCC decided to extend the comment period for the 2002 Biennial Review until January 2, 2003, with reply comments due by February 3 (FCC, 2002c). In the meantime, the issue of media consolidation was gaining traction in the Senate and among the public.

Competition Issues in the Telecommunications Industry

On January 14, 2003, all five Commissioners were called before the Senate Commerce, Science, and Transportation Committee presumably to testify about the state of competition in the telecommunications industry (*Competition Issues in the Telecommunications Industry*, 2003). The Commissioners issued written statements before their testimony, and all of the Commissioners described their thinking on issues such as broadband services, universal service, and preserving competition at the local level for telecommunication services. Powell did not address media ownership issues in his statement, nor did Martin. However, Commissioner Abernathy suggested that the FCC move forward to update outmoded regulations in media ownership saying that she believed that regulatory restraint was necessary to preserve competition and innovation in the telecommunications sector. Abernathy said it was her duty as Commissioner to do away with legacy regulations that impeded the growth of the industry. In her statement, she said that given recent court decisions, the FCC had no other choice but to provide the industry with distinct guidelines that would help them grow their businesses. Commissioners Adelstein and Copps both stressed their commitment to universal service and preserving local autonomy in the telecommunications industry. Furthermore, both Commissioners stressed the importance of gathering public input on the matter of media ownership rules.

Senator Ernest Hollings, the chairman of the committee, began the meeting by assailing Powell for a comment that he had made that asserted that the Telecommunications Act of 1996 was an experiment (*Competition Issues in the Telecommunications Industry*, 2003). Hollings then launched into what he a called a history lesson, one that detailed the legislative intent behind the bill and the history of communications regulations in America. Senator McCain then asserted that the telecommunications industry had been in crisis for some time, and he wanted to know why his constituent’s cable bills kept going up. McCain accused Powell of blaming Congress for the FCC’s failure to defend its rules in court, and he made it abundantly clear that he was not very pleased about that situation. In their opening statements, Senators Allen, Burns, and Brownback spoke about the deployment of broadband and wireless services and Brownback scolded Powell for indecency on television. Powell replied that the FCC did not receive very many complaints about indecency, so he had focused on other issues.

The tone of the Committee hearing did not improve by the time Senator Wyden made his opening statement (*Competition Issues in the Telecommunications Industry*, 2003). He launched into a monologue about how the FCC was allowing big media to get bigger, and he demanded to know what Powell's intentions were on the media ownership regulations. From then on, most of the hearing was devoted to the issue of consolidation in media, and none of the senators expressed anything remotely akin to satisfaction with the replies given by Powell.

Senator Byron Dorgan related his opinion that concentration in the radio industry had harmed consumers; he provided statistics from his home state of North Dakota to support his claim (*Competition Issues in the Telecommunications Industry*, 2003). Dorgan said that in his state, the four largest cities had 31 commercial radio stations. One company owned 13 of them, including all 6 commercial stations in one city. He said the national statistics were even more ominous. Senator Hutchinson warned the Commission to carefully weigh the potential adverse effects of relaxing ownership caps and stressed the importance of maintaining independent voices both locally and nationally. Senator Boxer stated that competition in media and telecommunication was crucial for consumers. She said that more media mergers were not healthy for the greatest democracy in the world. Hutchinson did not want to see a situation where a few companies controlled all the news outlets.

The Commissioners did their best to address the committee's concerns and Powell, Martin, and Abernathy tried to redirect the committee's focus back to telecommunication issues **(***Competition Issues in the Telecommunications Industry*, 2003). Adelstein expressed his concern that deployment of broadband and wireless services were rolling out too slowly in rural America. He wanted to ensure that every American had access to, and a choice between, telecommunications services of all forms. Commissioner Copps spoke about the public interest and responsible deregulation based on the best possible evidence. However, he also added that the FCC needed to hold public field hearings on media ownership regulations in order to create a national dialogue on this all-important issue.

After Copps spoke for the record, there was a return to the topic of competition in the telecommunications industry **(***Competition Issues in the Telecommunications Industry*, 2003). Many Senators wanted to know how the Commission would negotiate with local regulators, how they would attempt to get rates down for consumers, and how they would encourage new entrants into various sectors. Then McCain returned to his earlier query about the price of cable and how those rates had risen faster than inflation. McCain grilled Powell on the DBS and DSL asking why those technologies were not competitive with cable. Powell replied that there were new subscribers to those services each day, and that this was producing positive effects in the marketplace. McCain continued to express his skepticism and asked the Commissioners what had become of the highly touted convergence that he had heard about. No matter how the Commissioners responded, McCain remained unsatisfied with their answers. After the Commissioners attempted to respond to McCain's questions, Senator Brownback returned to his earlier question about violence and indecency over the air. Copps said that he did not think it was a coincidence that as the industry became more consolidated, there was a rising incidence of violence and indecency on television. That remark triggered another round of debate over the deregulation of media ownership rules and the Senators were off and running.

Senator Wyden expressed the opinion that the communications world was controlled by five companies: Disney, News Corp. Viacom, Clear Channel, and AOL Time Warner. Therefore, it did not make sense for the Commissioners to relax rules further so that one of those companies could take over everything in town (*Competition Issues in the Telecommunications Industry*, 2003). He specifically asked Powell to explain where he stood on this issue. Powell said the Justice Department would not allow one company to take over all outlets in a market no matter what the FCC decided. Powell was skeptical of what he said were melodramatic scenarios being drawn in the press, and he declared that he would not take a position on the rules until the ongoing review was completed. Powell then reminded the committee, many who were there when the details of the Telecommunications Act were first hammered out, that they were the ones who required the FCC to review the rules biennially. Powell also pointed out that the last time the agency had tried to defend the rules as they stood, the court threw them out saying that they were arbitrary and capricious and did not pass Constitutional muster. He then stated that some of the rules in question were over 40 years old and needed to be brought in line with the contemporary media landscape.

Still, the Senators insisted on badgering the chairman and the other Commissioners. Despite Powell's insistence that any new rules would protect diversity of voices, local news, entertainment, and competition, Dorgan reacted with cynicism and asked Powell if he was talking about more voices or talking about more voices by one ventriloquist (*Competition Issues in the Telecommunication Industry*, 2003; Mulkern, 2003). Wyden wanted to know if Powell thought it was okay by him that Clear Channel owned over 1200 radio stations. He wanted each Commissioner to answer that question for the record. Dorgan then gave a lengthy speech on the importance of localism and diversity and said further deregulation of the media was a train wreck waiting to happen. The discussion continued with each committee member expressing his or her reluctance to endorse further deregulation. Senator Olympia Snowe agreed with Copps that there should be a series of field hearings across the country. She added that she had heard that many citizens had questioned the validity of the MOWG studies and asked Powell to address this criticism. Powell said he would not fix on a particular study and try to defend it, he was not the author of the studies after all, but he did say that more concentration did not necessarily preclude diversity of programming. He stated that media companies with existing cross-owned properties in one market were able to deliver a better news product in many cases.

If there was any consensus that came out of this Senate Committee hearing, it was that the senators were warning the Commissioners to be very cautious about amending any of the media ownership rules as a result of their review. The scheduled purpose of the Committee meeting had been to discuss the state of competition in the telecommunications sector, but it had evolved to include the discussion of media ownership limits. Every Senator on the committee expressed concerns that the FCC might be moving too quickly and cautioned the Commissioners to carefully consider the potential ramifications of deregulation on a local and national basis. While all the Senators claimed to be watching out for their constituents, the degree to which they were willing to publicly criticize big media was remarkable given that they all depended on those same companies for favorable coverage during election cycles. Despite Powell's insistence that any new rules would protect the diversity of voices, local news, entertainment, and competition, once again Snowe urged Powell to hold more public hearings.

The Columbia Forum

The day after the senate hearing, Columbia University's Kernochan Center for Law, Media and the Arts held a forum on media ownership in New York City and asked the Commissioners to attend ("Columbia Law School," 2003**)**. In addition to Powell, Copps, Adelstein, and Martin, the participants included representatives from unions, media executives, musicians, and independent producers. There were five panel discussions on the schedule. The first was a discussion of legal issues surrounding media ownership regulations. Other panels were to address news and civic discourse, entertainment, community voices, and business concerns.

The first panel began sedately enough with Powell reading his opening statement. It was largely a familiar restatement of his previous claims (Powell, 2003c**)**. He said that the courts had forced the FCC to justify its media ownership rules and no matter what the outcome of the FCC's deliberative process was, there would be new rules set forth at the end of the biennial review process. He also said that the FCC was working hard to make sure that the broadcast ownership rules were not completely swept away by the hands of the court. He affirmed that he still held the conviction that promoting diversity, localism, and competition was in the public interest and that “ we can achieve these goals—and the courts will agree with us —if we do it in the right way” (Powell, p.2).

The right way, according to Powell, was to dispense with “sound bites” and emotional declarations and provide the solid empirical evidence that the courts were demanding (“Columbia Media,” 2003; Powell, 2003c). He urged the audience to look at the FCC’s MOWG studies and submit comments on them while there was still time. If the comments were filed correctly, Powell said, the FCC’s media regulations would no longer be based on personal anecdotes or personal bias, and thus the rules protecting diversity and localism would be defensible in court. The audience listened politely (“Columbia Media”).

Then Copps stepped up to the podium (“Columbia Media,” 2003; Copps, 2003b). With a dramatic flair, he began by saying that the forum may well be the most important meeting in America taking place today. Copps spoke about his concern that further consolidation in media could drastically alter the media landscape for future generations. He expressed his trepidation that the FCC was rushing forward with new rules without the kind of debate and analysis that the issue deserved, and he suggested that the state of consolidation in radio offered a model of what could happen if ownership restrictions were relaxed in other sectors of the communications industry. According to Copps, radio in most markets was dominated by oligopolies. He detailed complaints by media watchers who said that there was far less coverage of news and public affairs programming on radio than there had been before the 1996 Telecommunications Act.

Then Copps pointed to some charts he had prepared for the forum (“Columbia Media,” 2003; Copps, 2003b). The chart showed that 5 companies controlled vast numbers of television and radio stations, cable networks, newspapers, magazines, book publishers, music, concert promoters, and web sites. The second chart showed that the same corporations that owned the television networks and cable providers owned 90% of the top 50 cable channels. He said only 5 of the top-rated cable stations were independently owned. The third chart showed the audience that the Internet was showing signs of concentration as well. According to Nielsen, the aforementioned companies also controlled the top 20 Internet news sites. Then Copps told his audience that although the comments of business executives from the industry were important to take under consideration, in his opinion every citizen in the country had a stake in these issues. While Copps congratulated Powell for deciding to schedule an official hearing on the issue in Richmond, he said that by keeping the hearing so close to the beltway, it would ensure that most of the attendees would be lawyers and the sorts of folks who read the *Federal Register*.

Copps also described the tenor of the Senate hearing the day before, where both Republican and Democratic senators expressed their concerns about media consolidation (*Competition Issues in the Telecommunications Industry*, 2003). Copps said the FCC and media needed to do a better job of reaching out to average citizens who are the people who will be most affected by any changes in media ownership rules. He thanked the organizers of the forum, but also said that the onus for public discussions of these important issues should not be left up to private organizations; rather the FCC should be required to organize more events like this one.

Commissioner Martin spoke next about his belief that although concentration in media has increased, so had diversity ("Columbia Media," 2003; Martin, 2003a**).** He cited statistics from Nielsen that showed that the average cable household was able to receive 102 channels and that cable penetration had increased as well. Martin gave Copps credit for raising the question of whether the rise in coarse television programming could be the result of consolidation, but he insisted that newspaper owners should be allowed to own television stations in the same markets. He also suggested that some of the consolidation in radio might be due to the Commission's definition of markets.

Despite Powell's plea for the audience to stick to the facts, the crowd of network executives, consumer advocates, producers, academics, and others responded with strong opinions about media consolidation **(**Brady, 2003; Gatlin, 2003). Richard Masur, an actor and former president of the Screen Actors Guild, asked "What possible objective metrics can we give you about diversity, other than opinion?" (Gatlin, 2003, p. 27). However, Ellen Agress, senior vice president of the Fox Entertainment Group, said that the TV stations owned by the four networks provide substantially more local news than stations that are not owned by the networks. Juan Gonzales, president of the National Association of Hispanic Journalists, referred to a study that showed 92% of all U.S. news sources on newscasts in 2001 were White, and less than 1% were Latinos. David Poltrack, executive vice president of research and planning for CBS, said he estimated that only two of the four major networks made a profit on their prime time schedules during the 2001-2002 season. However, Jon Mandel, president and CEO of MediaCom, a media buying and planning agency, took exception with that remark. Mandel claimed that the networks dropped the percentage of net advertising revenue that they spent on programming by 26%, according to information that they submitted for an FCC report. Therefore, Mandel said, his costs for prime time advertising had gone up 42% over the same period. Mandel claimed that advertisers and consumers were hurt by increased consolidation in the industry. Consumers suffer, according to Mandel, because the networks have decreased the amount of programming with affordable advertising rates so they get poorer programming and steeper prices at the retail level.

As the discussion became more heated, television producers expressed their opinion that the relaxation of the Fin-Syn Rules had frozen them out of prime time programming, resulting in fewer scripted programs and more reality shows that debased the quality of network offerings ("Columbia Media," 2003). Network executives countered that programs like *Survivor* were not inexpensive, and if the networks were not allowed to maximize economic efficiencies of scale, free television would become extinct and more and more programs would only be offered on a pay-per-view basis.

One member of the audience, Monroe Litman, 72, of Manhattan created a ruckus when he decried the lack of coverage of the ownership debate in mainstream media outlets ("Columbia's Forum," 2003). Even though the forum was broadcast over the Internet, on WBAI, and other Pacifica affiliated stations and even though Bill Moyers had a camera crew from PBS' *NOW* at the forum, none of the major networks chose to cover the hearing. There was widespread agreement among antideregulatory participants, who were largely responsible for organizing the event that the public needed to be more informed about the debate.

Harry Jessel, editor-in-chief of *Broadcasting & Cable*, who was asked to moderate a panel discussion for the forum, wrote a column about his experience for the trade journal (2003**).** Jessel, who clearly stated that he saw no harm in allowing further deregulation, pointed out to his readers that the one thing he learned at the hearing was just how passionate media activists were about these issues. He said it is one thing to read formal comments submitted by unions and consumer groups, but it was quite another to hear how committed they were to their positions in person. He said that although the forum had been vociferous, it was what democracy sounded like. Jessell acknowledged that *Broadcasting* & *Cable* had printed an editorial a few weeks earlier that asserted that folk wisdom was overrated and that holding more hearings would not produce any more information than was already known. However, he conceded that if the Columbia debate was representative of how people actually *feel* about media consolidation, the Commissioners needed to get out there and listen. He also urged broadcasters to do a better job of covering the issues so people outside of the industry could understand what was at stake. Indeed, it appeared that Jessel was not the only one who had underestimated the unswerving commitment to existing ownership policies that many people held. Powell left the forum after making his opening remarks and missed an opportunity to understand, as Jessel wrote, how people *felt* about the issue.

The following week Powell (2003e) wrote an editorial for *USA Today* on the task his Commission was facing. He started his piece with an analogy from *Dragnet*, a popular television show in the 1960s. He quoted the character Sgt. Joe Friday, who was famous for saying, “just the facts ma’am” and said,

> Unfortunately, many have turned this critically important policy debate into a political one, substituting personal ideology and opinion for the facts. If we are to craft responsible media policy for the 21st century, everyone involved in this debate must set aside the rhetoric, put the public interest before political interest and focus on "just the facts." (Powell, 2003e, p. A11)

Powell’s piece went on to describe a media environment full of abundance and featuring a bottomless well of information (Powell, 2003e). Then he brought up the court decisions that required the Commission to set legally sustainable limits on media ownership. The points that Powell made were not unfamiliar to those who had been following the debate, but to those members of the public who may not have even known that a controversy existed, Powell's appeal must have seemed eminently reasonable. After all, who would not sympathize with a public servant who based his arguments on facts and reason instead of rhetoric and politics? The problem with Powell's argument, however, is that he failed to understand that media ownership was in itself a political issue, one that inspired soaring rhetoric and visions of a more participatory democracy. The state of the media environment in the 21st century was about the perception of how that environment may affect ordinary citizens; it was not about numbers or economic efficiencies. This was not about merely stating the facts ma'am; it was about the interpretation of what those facts meant.

Senate Radio Hearing

Despite Powell's avowed promise to stick to the facts and avoid political rhetoric on the subject of media consolidation, the Senate Committee on Commerce, Science, and Transportation had no such compunction when it held a hearing on radio consolidation at the end of January (*Media Ownership*, 2003). The hearing began with an opening statement by Senator Feingold, who described how much radio had affected his life. He spoke about the power of music to inform, inspire, and connect a community to each other. He told the Committee how Bob Dylan's songs about the civil rights movement had motivated a generation to work for social justice. Feingold discussed the anti-competitive practices of Clear Channel Communications and his sons' complaints that they were not hearing good music on the radio. He said the Telecommunications Act of

1996 had driven small mom and pop radio owners out of business. He spoke out against local radio stations being operated remotely and wondered how residents would get emergency information if a disaster occurred in their community. Feingold bemoaned the lack of local news and community affairs programming on the radio. He spoke of the unethical practice of pay-per-play, and how concert tickets had risen over 60% since the passage of the Telecommunications Act. He told the committee that the first Black American Mayor Harold Washington of Chicago would never have been elected if local radio stations had not raised public awareness for his campaign. He wondered if remotely programmed radio stations would even be interested in community issues if their programmers resided thousands of miles away from the communities where their stations were licensed. Feingold said he was surprised to hear how powerfully his constituents felt about the issue. He was eloquent, anecdotal, and articulate, and he urged his fellow committee members to cosponsor a bill that he was proposing that would prevent large radio companies from cross-leveraging their radio and concert businesses. Powell would have been horrified had he been at the meeting.

Senator Hollings treated the committee to a comprehensive history of broadcast regulations from their inception (*Media Ownership*, 2003). He declared that no one who had been present when the Telecommunications Act of 1996 was debated could have foreseen the amount of consolidation in radio that took place after its passage. He also said that beyond the impact of consolidation, there were troubling allegations that Clear Channel with its 1,211 radio stations, 135 concert venues, and 700,000 billboards had engaged in anticompetitive practices that harmed independent promoters, musicians, and consumers. Furthermore, he added that Wall Street had profited handsomely from the gains due to consolidation. He said:

> Radio consolidation has contributed to a 34 % decline in the number of owners, a 90 % rise in the cost of advertising rates, a rise in indecent broadcasts, and the replacement of local news and community programming with remote “voice tracking” and syndicated hollering that ill-serves the public interest. If ever there were a cautionary tale, this is it. (*Media Ownership*, 2003, p. 18).

Senator Berman from California also expressed his extreme displeasure with Clear Channel Communications and recited a litany of allegations about the company (*Media Ownership*, 2003). Berman then went on a tirade against the Department of Justice (DOJ) who he said had ignored his and his constituents’ complaints about the company. He said he had repeatedly failed to get the DOJ interested in the issue and claimed, when told that the Bush administration had little interest in pursuing antitrust complaints, he had just refused to believe it. Therefore, he was urging Congress and the FCC to investigate the complaints that have been made about Clear Channel many times, by many different people, who worked in various segments of the industry.

The only committee member who did not attack Clear Channel outright in his opening statement was committee chairman Senator John McCain (*Media Ownership*, 2003). He admitted that the radio industry had become consolidated and that the large number of stations owned by Clear Channel was potentially troubling, but he said he was looking forward to hearing what Lowry Mays had to say. McCain reiterated his oft-stated position that he was inclined to favor market-based solutions to the problem. Nonetheless, he said he was disturbed by some of the allegations he was hearing against Clear Channel.

By the time Lowry Mays, CEO and president of Clear Channel Communications was allowed to speak, he was clearly on the defensive (Lee, 2003). Mays denied that his stations engaged in anticompetitive practices and said that that all of his employees are required to sign statements that say they will not accept payola. Mays said that deregulation and economics of scale allowed his company to reinvest profits and expand his company's offerings. Therefore, consumers had benefited because his company had eliminated redundant formats and created new ones in many markets. Mays said the industry was healthier than it had been previous to deregulation, and that he would never jeopardize his core radio business by refusing to support musicians who used other promoters. Mays claimed that Clear Channel would not be successful if local managers and employees of his radio stations did not serve the needs and interests of their communities.

President and CEO of the NAB, Edward Fritts, reiterated Mays' claim that radio was financially more stable than ever before (*Media Ownership*, 2003). Fritts said that 10 years ago, before the passage of the Telecommunications Act of 1996, 60% of the radio stations on the air were losing money and some were forced off the air. He said that radio was the most local and least consolidated of all media, and that radio remains the "ultimate local community medium" **(***Media Ownership*,p. 7). Fritts said that if broadcasters were not allowed to own more radio stations that enabled them to benefit from economic efficiencies, the radio industry would be an economic failure.

Although Don Henley, singer-songwriter and representative of the Recording Artists Coalition, did not dispute that the radio industry was more profitable now than it had been, he accused Clear Channel of using its size to squeeze out competitors and to coerce promotional deals with performing artists to benefit the company (*Media Ownership*, 2003). Henley cited anecdotal evidence that Clear Channel had purchased stations in Mexico in order to avoid FCC ownership regulations, that the company had made deals that skirted around the rules against payola, and that it had strong-armed artists into performing for Clear Channel Productions. Henley even claimed that some performers were forced to pay independent promoters to get their music on Clear Channel's stations. He said that artists were often required to make unpaid appearances on Clear Channel stations to promote their concerts in exchange for airtime (Davidson, 2003a; Martin, 2003). Henley asserted that consolidation in radio was preventing new artists from getting airplay, and that comparing radio to other media was misleading**.** He said, "the airwaves belong to the public, just like the national forests belong to the public" (Lee, 2003, January 31, p. 8).

Robert Short, president of Short Broadcasting and a representative of independent radio stations, said he was forced to sell his urban-oriented station in Syracuse because he could not match Clear Channel's advertising rates. He also said that Clear Channel was using unethical methods to force smaller stations to sell out to the company, and Short asserted that if Clear could own every radio station in the country, they would (Davidson, 2003a).

Jenny Toomey, herself a musician and executive director of the Future of Music Coalition, said that according to a study her organization had conducted, while it might be true that Clear Channel only owned about 10% of all radio stations nationwide, if one examined radio market by market, the radio industry tends to look like an oligarchy (Decola & Thomson, 2002; *Media Ownership*, 2003). Toomey said that four or fewer companies control at least 70% of market share in nearly all local markets (Lee, 2003).

The size of Clear Channel's operations had clearly become a contentious issue.

According to an article in the *New York Times,* Clear Channel took in about 20% of all advertising revenue and attracted about 25% of all listeners nationwide, which is equivalent to around one third of the nation's total population (Lee, 2003). Lee also reported that Clear Channel had become worried about all the negative attention it was receiving. Consequently, according to Lee in November 2002, Clear Channel opened a lobbying office in Washington, DC staffed by a former aid to Rep. John Dingell, the ranking minority member of the House Commerce Committee.

Four days before the hearing, on January 28, Senator DeWine, a Republican from Ohio, and Senator Kohl, a Democrat from Wisconsin, who were both serving on the Senate Anti-Trust Subcommittee, sent a letter to the FCC imploring Powell to maintain the public interest in broadcasting by protecting diversity on the airwaves (Halonen, 2003a). The Senators asked the Commissioners to carefully weigh any potential harm to consumers' need to access differing views on news and public affairs programming. The letter also said that any significant relaxation of media ownership rules would lead to further media consolidation. According to Jeff Chester, executive director of the Center for Digital Democracy, the letter represented the strongest expression yet that "there is real concern that [FCC Chairman] Michael Powell is going too far" (Halonen, p.3).

Summary

As a former chief of staff to Senator Fritz Hollings for over a dozen years, Commissioner Copps may have been more oriented toward public opinion than were other career staffers and colleagues at the FCC. He certainly demonstrated a clear grasp of the political problems that might occur if the public, a stakeholder in the policy-making process, was discounted. Copps was also relatively new to the agency and, therefore, had not necessarily established a long history of dealing primarily with industry representatives and economic and legal analysts that revolved through the offices of the FCC.

By all accounts, the Senate was also clearly concerned about mounting opposition to further deregulation of the media. The message they were hearing from their constituents was that the public was concerned about media consolidation. This was a political problem, not an economic one. Although many in Congress had heard complaints about the various failures of the media before, now they were hearing much more specific complaints about problems that were deemed to be a result of consolidation in the industry. While Feingold's opening statement to the Committee investigating media ownership in radio was emotional and full of political rhetoric, it reflected widespread public sentiment that something had gone terribly wrong in the radio industry. Although the allegations against Clear Channel's business practices were specific to that company, citizens were clearly concerned about the perceived lack of localism in radio. If Hollings was correct when he said that the state of radio was a cautionary tale for what was to come if the FCC allowed further consolidation across the media, the political pressure on Powell was bound to increase.

Chapter 9 explores the growing opposition by the public to the possibility of relaxed media ownership rules that was confirmed by the only officially sanctioned public hearing in Richmond, Virginia.

CHAPTER 9

THE PUBLIC WEIGHS IN

Despite Michael Powell's reluctance to hold a field hearing to engage the public in a discussion of media ownership policy, he finally capitulated to political pressure and scheduled one hearing in Richmond, Virginia (FCC, 200h). All of the Commissioners attended the hearing and made introductory statements followed by panel discussions centered on preapproved topics (FCC, 2003g). After each discussion, there were brief question and answer sessions when the audience was allowed to participate. The speakers chosen for the panels were predictable, and the arguments presented could not have been particularly enlightening to the Commissioners or the experts on the panels. However, if Powell had listened carefully to what the audience had to say, he might have been able to anticipate the firestorm that awaited him in the upcoming months.

Richmond

As a major snowstorm swept through Washington, DC on February 27, 195 people made their way to the Richmond, Virginia, Convention Center to attend the only officially sanctioned hearing held to discuss the prospective changes in media ownership regulations. According to the *Washington Post*,

> One hundred and nineteen of them [attendees] were white men in suits; many of those men were grumbling about the trip down from Washington. Of the 22 people

> scheduled to address the audience, 13 had traveled to Richmond from Washington DC. (Fisher, 2003, p. C.1).

Chairman Powell began by telling the audience that to date, the FCC had received upward of 15,000 comments from the public on media ownership regulations. He noted the technological innovations that allowed for public participation via the Internet in the rulemaking process (FCC, 2003h). He said that the written comments along with the public input at the hearing would supplement what he called one of the most exhaustive records in modern FCC history. Powell repeated his earlier assertion that Congress and the courts were forcing the Commission to revise its existing regulations. He also said that the FCC had no other choice but to proceed methodically in order to provide evidence that the courts would accept.

Commissioner Abernathy spoke next and reiterated Powell's argument that the courts were demanding that the FCC provide justification for retaining its regulations (FCC, 2003h). She spoke about the tremendous changes in the marketplace and the increased number of choices that allowed consumers to access a diverse array of programming. However, Abernathy also said that increased consolidation in media was a concern to her, and that it was her job as a Commissioner to look at the effects of consolidation on diversity and competition. Therefore, it was her duty to examine whether current restrictions were outdated. She thanked the attendees for their commitment to working with the FCC to ensure that the Commissioners were making well-informed and reasoned decisions.

Then Copps stepped up to the podium (FCC, 2003h). He too echoed his previous statements and said that the decisions that the FCC would be making over the next few months were of profound importance to democracy. Therefore, the stakes were extremely high. He said he had two goals for the hearing. One was to receive input from local and state residents who lived and worked outside of the beltway, and the second goal was to help raise awareness about the issues discussed.

Copps clearly expressed his reservations about the possibility of increasing consolidation in media. He warned that what had happened with radio since the passage of the Telecommunications Act of 1996 was a good predictor of what could happen if other media ownership rules were relaxed. Copps reminded the audience that media watchers such as Robert McChesney, the Consumer's Union, and the Media Access Project were arguing that concentration had led to far less coverage of local news and public affairs programming and that radio now existed to advertise products rather than to provide Americans with the best and most original programming. Copps then called the audience's attention to a host of potential problems that the FCC studies had not considered and asked the attendees to comment on as many of these questions as possible. Copps said it was essential that the agency hear from nontraditional stakeholders. He closed his remarks by noting the death of Fred Rogers and held him and his program, *Mr. Roger's Neighborhood*, up as an example of someone who used the media to serve the public interest.

Martin spoke next and agreed that diversity and competition in media were key components in a democracy (FCC, 2003h). He discussed the court's mandate to reexamine media ownership rules and stated that the changes in the media landscape must be factored into any decision the FCC might make. He also suggested that cross-ownership rules that forbade newspapers from buying a broadcast station in the same community were unfair and inconsistent with rules that allowed radio and television combinations in a single market.

Although Adelstein had only served on the Commission for 3 months, he apparently had no qualms about expressing his opinions. In his opening statement, he began by thanking Copps for his efforts to take the discussion of media ownership policy outside of the beltway (FCC, 2003h). Like Copps, Adelstein stressed that the decisions the Commission would be making in the upcoming months were of critical importance to all of the public. Adelstein told those assembled about the Senate Commerce Committee hearing that was scheduled to discuss telecommunications policy but instead had quickly turned into a heated debate over media ownership regulations. Adelstein assured the audience that the senators at that meeting were very concerned about these issues, and he asserted his conviction that the media market is not like other markets for other products. For example, it was not as if the FCC was determined to regulate the price of candy, but rather, the Commission was charged with promoting the public interest. Adelstein quoted from the Supreme Court decision in *Red Lion* (1969), "It is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged by Congress or by the FCC " (FCC, 2003h, p. 32; *Red Lion v. FCC*, 1969).

According to Adelstein, it was important to keep the Supreme Court's mandate in mind, and he said that the decision in *Red Lion* in 1969 was just as relevant as ever. Adelstein praised Powell's initiative to provide empirical data with the MOWG studies but also offered his opinion that the kinds of questions that the FCC was seeking to answer at this hearing were not amenable to mathematical proofs or purely quantitative analysis. He stressed that it was important to look at the history of regulatory decisions. Adelstein also pointed to consolidation in radio as an example of past decisions that most people did not favor. Before he finished his remarks, he paraphrased one comment that he heard during the Columbia Hearing. He said that someone told him that the FCC was rushing to make monumental decisions in a time frame that was shorter than the NBA Basketball season and that more time needed to be allotted for the process.

The Panelists

After Adelstein's comments, Thomas Krattenmaker, the moderator of the discussions, gave a brief history of the rules under consideration by the Commission and summarized the recent court decisions that were propelling the inquiry (FCC, 2003h). Krattenmaker, a former professor and former dean of the Law School at the College of William and Mary, was also the former director of research at the FCC. At the time of the hearing, Krattenmaker was a senior counsel in the Washington, DC law firm of Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo where he specialized in communications transactions and antitrust cases ("Krattenmaker Biography," n.d.). While eminently qualified to summarize broadcast ownership rules and the key issues under discussion, Krattenmaker was also a quintessential Washington insider whose job it was to facilitate business transactions for media corporations.

After Krattenmaker's summary, he reminded the panelists and the audience that each of the speakers would have 5 minutes to make their statements (FCC, 2003h). Members of the audience were invited to write down their questions, and Krattenmaker would forward them to each speaker after the panelists made their opening remarks. After the discussion, the microphone would be open for comments from the audience on a first come, first serve basis, and each speaker would have 3 minutes to address the panel.

The first panel, convened to discuss diversity issues, began with a statement by Brent Bozell III, president and founder of the Parents Television Council, a conservative organization that tracked the media (“Bozell Biography,” n.d.). Bozell described the angst he felt as a Libertarian who was advocating for more government regulation. He said that his organization represented over 750,000 members who were

> disgusted, revolted, fed up, horrified, I don't know how else to underscore this, by the raw sewage of the ultra violence, the graphic sex, the raunchy language that is flooding into their living rooms day and night through the television screen and poisoning the minds of an entire generation of youngsters whose parents' concerns are dismissed by an industry that admonishes them instead to stand guard over the TV sets, perhaps with a baseball bat to keep impressionable children away. (FCC, 2003h, p. 51)

Bozell said the Commission was not serving the public interest and that consolidation in media had led to the decline in the quality of television programming. Robert Corn-Revere, a communications law specialist at the Washington, DC law firm of Hogan & Hartson was the next panelist to speak (“Corn-Revere Biography,” n.d.). He had previously acted as a legal advisor to James Quello, a controversial FCC Commissioner from 1974 to 1997. The gist of Corn-Revere’s remarks was that blaming consolidation in media for the problem of insipid content was a red herring (FCC, 2003h). He reminded the audience that the Commission had to be mindful of broadcaster’s First Amendment rights and that the FCC should not be in the business of regulating programming content.

Jay Ireland, president of NBC Television Stations, spent the bulk of his time arguing that broadcast television was at a considerable competitive disadvantage in a media world that was fraught with competition for viewers (FCC, 2003h). He cited the

Internet as an example of the diverse array of information that was now accessible to all. Ireland explained that not only was broadcast television losing its audience share, but it was also facing skyrocketing production costs. Ireland claimed that most industries did not get in trouble with regulators until they reached a 40% share of a market, yet the networks were penalized when they reached a 3% share during primetime. He said that in the top-50 markets, national chains owned most of the stations and were no more local than the networks. Ireland also claimed that when affiliates substituted local programming for network programming, they were not offering original locally produced shows but were instead recycling programs provided by syndicaters. Then Ireland launched into a passionate defense of diversity on television, noting that NBC had recently purchased Telemundo, a Spanish language network that it wanted to extend to more markets. However, FCC ownership caps prohibited his network from doing so. Ireland also said that it was in the network's best interest to offer diverse arrays of viewpoints, and offered *Law and Order*, a conservative-leaning show, and the *West Wing*, a liberal-leaning show, as examples of the varied viewpoints offered by a single network.

Alfred Liggins, chief executive officer and president of Radio One, said he was there to inform the Commission about how consolidation in radio had affected minority ownership (FCC, 2003h). He related the story of his own company, the only minority-owned station in Richmond, to various changes in regulatory policy. In 1978, Liggins said there was only one minority-owned television station and 68 minority-owned radio stations in the country before the FCC instituted its tax certification policy. By 1995, when the policy was dropped, and comparative hearings ended, there were 35 minority owned television stations and about 320 minority-owned radio stations nationwide. However, Liggins made a point of noting that there had been a significant decrease in minority-owned stations since 1996 and said that although deregulation had enabled his company to grow, policy changes may have hurt other minority-owned companies that offered unique services to their communities.

Liggins recounted many community services his company provided in different markets and described how Radio One offered unique programming targeted to the African Americans served by his stations (FCC, 2003h). Liggins said his mother started the company in 1980 with one AM station that she was able to purchase because of the FCC's distress sell policies that were in effect at the time. Her goal was to serve the unique needs of the African American community. By 2003, the company had grown to 65 stations, with 60 formats targeted to African Americans in 22 different markets. Liggins said that the success of his company was due to taking it public and taking advantage of Clear Channel's commitment to divest a number of stations acquired from its AM-FM acquisitions to minority-owned companies. He said this was an example of how deregulation actually created more diversity, rather than less.

Victoria Riskin represented the Writer's Guild of America (West) and began by reeling off a number of statistics that showed that independent producers were not being served by consolidation in the industry (FCC, 2003h; Slocum, 2003). She said the Guild members had less of an opportunity to present their shows on network or cable stations since the Fin-Syn Rules were relaxed. Since the networks owned many cable stations, they aired programming produced by their own companies on both. Riskin offered evidence provided by an independent Wall Street analyst that said that in December 2002, five media conglomerates controlled a 75% share of prime time programming. Riskin said that the current situation stifled the diversity of voices on the airwaves. She strongly suggested that the FCC consider how further consolidation could affect diversity even more profoundly.

Andrew Schwartzman, founder of the Media Access Project, began his talk by stating that he thought the FCC should retain all of its media ownership rules, except that it should eliminate the UHF discount (FCC, 2003h). Schwartzman then chastised Powell for agreeing to hold only this one public hearing. He said that in order to really obtain a diversity of public opinion, more hearings needed to be held with far fewer familiar faces than those who had simply driven over to Richmond from their offices in Washington, DC. He went on to tell the audience how he had debated these very same issues with many of the panelists on numerous other occasions in the capital, and that it was not very useful to have the same people state the same viewpoints that were available to the Commission at home.[4] Indeed the roster for the panels read like a virtual who's who of media attorneys, media activists, industry representatives, and economic analysts from the nation's capital (Fisher, 2003; Shields, 2003b). While there was a sample of local representatives in attendance, even those participants were directly or indirectly tied to the industry. They were, as Copps had put it, the usual suspects.

Schwartzman praised the public service records of many of the broadcasters on the panels. However, he pointed out that the regulations under discussion were in place to police the practices of the worst broadcasters, not the best (FCC, 2003h). He said media ownership rules were established to serve the entire public, not just those who were attractive demographically. Schwartzman also offered his opinion that the word *empirical* meant verifiable, and it was not a concept that was exclusively defined by

[4] The transcript of the hearing noted that Schwartzman received a round of applause for these remarks.

statistical analysis. He suggested that Powell's directive to stick to empirical facts exclusively meant that the FCC was discounting other types of verifiable evidence. Furthermore, he said that Powell's reading of the court's decision was a cramped interpretation, and the court never said that only statistics count. Schwartzman also reminded the Commission that they had asked for alternatives for measuring competition and diversity and that his organization, together with other public service groups, had asserted that a weighted version of the HHI index would provide more accurate assessments of any given market.

The last speaker on the first panel was Wendy Thompson of ZGS Broadcast Holdings, a small Hispanic broadcaster (FCC, 2003h). She urged the Commissioners to vote against further deregulation in media because increasing consolidation was decreasing the amount of minority ownership of media properties and thus decreasing diversity. Her company operated low-power television stations, and she urged the Commissioners to allow stations like hers to increase their power so they could serve larger geographical areas.

With the conclusion of Thompson's speech, Krattenmaker declared that although they were out of time, he would still ask the Commissioners if they had any questions for the panelists (FCC, 2003h). Adelstein asked Ireland about his statement that the Internet increased the options available to consumers. The Commissioner offered an example of someone who was seeking a local weather report and suggested that it was highly unlikely that an individual would go to the National Weather Service's web site to find out if it was going to rain that day. Adelstein said that the majority of Americans rely on local television and radio stations to serve as gatekeepers for the information they need. He asked if the majority of the most visited news sites were owned by major corporations, was it not true that people still seek out gatekeepers to provide them with professional news analysis? Furthermore, Adelstein asked Ireland if he felt that the Internet was an effective substitute for programming that people got from other sources. Ireland replied that the most important point was that people now had more choices on the Internet.

Schwartzman jumped in and said that the Internet has yet to become a significant source for original local content about news and information (FCC, 2003h). He said that most of the information content on the Internet was recycled from local broadcast and newspapers that had leveraged their incumbent status. He said the FCC's own studies showed that the Internet is not an effective substitute for other sources of local news.

Powell then addressed Bozell's statements and said that the problem with trying to regulate programming content was that it often came down to criticizing programming that the vast majority of the audience preferred to watch (FCC, 2003h). Powell said that even if the FCC or the Parent's Television Council preferred that people view certain types of programming over other genres, the fact remained that the "sludge" Bozell complained about was the sludge that most people preferred to watch. Bozell conceded that that might be the case, but also submitted that when there were only a handful of corporations controlling two thirds of the access to programming out there, then the corporations were the ones that decided what the public wants.

Copps followed up the comment by asking Bozell how someone who stands for less governmental interference in people's lives could advocate for taking action against indecent and violent programming and why his organization was arguing against deregulation (FCC, 2003h). Bozell said simply that in his entire professional career he had not seen such an outpouring of emotion on any other issue. He said his membership cared passionately about the state of the media and believed that increasing consolidation was responsible for producing content that was harmful to children. He asked the FCC to take an aggressive stance to stem the tide. Copps volunteered his assessment of the discussion and said that the issue of indecency might be an outside—the—beltway issue that concerns thousand of Americans. Bozell replied that very few of his 750,000 members even knew of the Commission's proposed rule changes, but all of them cared deeply about violence and indecency on the public's airwaves.

Powell then asked Risken about programming content, and she said that the race for ratings and the bottom line has kept quality programs off the air (FCC, 2003h). Abernathy offered her opinion that there were many wholesome alternatives offered on cable television. She reinforced what Powell said about trashy programming and agreed with him that most people chose to watch programming that Bozell found distasteful. Schwartzman said that the problem with this type of reasoning is that the market will always take care of the majority, but it is the job of the FCC to offer corrections if the market fails to provide quality children's programming, for example. The discussion went back and forth between Schwartzman and Abernathy for some time, and then Martin asked Corn-Revere if he saw any connection between consolidation and indecent programming. Corn-Revere said he did not see a connection. For another 10 minutes, the panelists discussed whether the *Sopranos* was a creative, quality program or just another example of violent and indecent entertainment. There was no consensus reached.

While each of the panelists may have had unique perspectives to offer the audience, none of the panelists was unfamiliar with these perspectives. All agreed that diversity was an important value to maintain. It is fair to say that neither the Commissioners nor the panelists learned anything from the discussion that they had not heard before; they were talking to each other as they had many times in the past.

The first panel was representative of the discourse presented by the second and third panels (FCC, 2003h; James, 2003; Shields, 2003b). Overall, the big media representatives discussed how wonderful their companies were and how much they offered to the communities they served. The smaller broadcasters bemoaned the state of the industry and were opposed to any further deregulation that would jeopardize their own ventures. They too, espoused the value of localism, diversity, and competition. The union representatives claimed that their members were being hurt by consolidation, the musicians said consolidation in radio was harming them, and the Newspaper Association of America said that it could no longer operate competitively without being allowed to purchase broadcasting properties in their communities. However, Frank Blethen, publisher of the *Seattle Times,* was vehemently opposed to the abolishment of the cross-ownership rules because he felt that each community should be served by a diverse array of media voices. Still, the remaining discussions came down to the big guys against the little guys and thus were fairly predictable, if not educational, for the audience (Fisher, 2003).

By far the most interesting part of the hearing came when the audience was allowed to speak (FCC, 2003h). Because the panels had run over the time limit, Krattenmaker reduced public comment time to 2 minutes per person. The total time allotted for public comments at this field hearing only amounted to about 1 hour versus 4 for the panelists. Nonetheless, some of the citizens raised some interesting points (McChesney, 2004a).

The Audience Interprets the Rules

After the first panel, an unidentified participant stepped up to the microphone and said he was offended when the president of NBC said his network could do local programming (FCC, 2003h). He said that his low-power radio station offered truly localized coverage of his community and urged the Commission to push for the licensing of more stations like his. This person also said that media ownership would not be such a big problem if there were more local media to own. Dee Dee Hallick, an independent producer and media activist, offered her opinion that people who produced independently financed documentaries were effectively frozen out of the television and cable market unless their name happened to be Ken Burns. Hallick said that consolidation forced diverse viewpoints off the air, and that this was a great loss for democracy. Several other commenters also related incidents when they were not able to get their work on the air. One student from Virginia Tech, representing the Virginia Citizen's Consumer Council, said that her organization had been trying to obtain coverage in local media about the restructuring of Virginia's electricity markets but had been told that the issue was too complicated for citizens to understand. Kerkus said that further relaxation of media ownership rules would make it far too easy for a small number of corporations to control the public discourse.

Several radio and television broadcasters who owned AM or low-power television stations said that because of consolidation, they could not expand their reach in local markets (FCC, 2003h). Arthur Mobley said that although he wanted to broadcast local sports, he could not obtain a license to broadcast after dark when most of the games were played. Nathan Long, an educator at Virginia Union University, an historically African American college, quoted a passage from one of McChesney's books that said the role of the media is not to entertain us but to give us what we need to know. He said further consolidation would only bring about less diversity and fewer options concerning news and opinions.

Another educator, John Richmond, a principal at a local school, said that the only reason he was able to attend the hearing was because his school was closed due to the snowstorm (FCC, 2003h). He implored the Commission to hold more hearings in the evenings or on weekends so working folk could attend. This sentiment was repeated several times over the course of the hearing. Principal Richmond was concerned about consolidation in the radio industry. He said that despite the claims of Clear Channel and others, more formats do not lead to more diversity and, in his opinion, all the stations played the same songs regardless of their advertised format. He said that the news he received on his local television stations was formulaic and virtually identical on each station. Richmond suggested that the FCC allow more low-power radio stations to go on the air so people could hear diverse coverage of local news and a more diverse array of music.

Jenny Crummiller, from the Antiwar Video Fund, recounted her difficulties getting a 30-second antiwar video spot to run on Comcast, the only cable provider in Washington, DC (FCC, 2003h). Her group had a contract to air an advertisement three times on the evening of the President's State of the Union address. At the last minute, Comcast refused to run it. According to Crummiller, Comcast said the spot was unsubstantiated, but she described it as a 30-second montage of citizens speaking out against the war. Crummiller said the decision to pull the spot was arbitrary. A few minutes later Dan Preston, also from the Antiwar Video Fund, updated the story. He said that ultimately NBC and ABC also refused to air the spot, and eventually, at a far greater cost, he was able to persuade one CBS affiliate to run the political advertisement. Preston argued that this type of censorship was insidious because the public never gets an opportunity to find out about what it is missing. According to Preston, a local Comcast channel produced a news segment about his group, but when the station's management learned that Comcast's corporate headquarters had refused to air the spot, the local station dropped the story. Preston said one of the reporters at the local station confided that the reason why the story was dropped was because the reporter did not want to lose his job. Although NPR, PBS, Canadian, French, and Arabic Television, plus a few small local papers, picked up the story, none of the media properties owned by conglomerates reported on it. Preston said that consolidation in the media was suppressing the diversity of voices, which he said was especially important now, given the debate over the war.

Later in an afternoon session of public input, Glen Best from the Sierra Club also said that his organization had been unable to get proenvironmental messages on the radio in Detroit and in Idaho (FCC, 2003h). Clear Channel in Idaho and Viacom in Detroit rejected the advertisements. He asked the Commissioners how the marketplace of ideas was supposed to thrive in an environment where fewer and fewer corporations controlled access to the public's airwaves.

Katie Ewell said that she was there because the Commissioners had asked ordinary citizens to come to the hearing to offer their views (FCC, 2003h). Ewell, who lived and worked in Richmond, said she just happened to catch an article about deregulation in the local paper and took it upon herself to research the subject. Ewell said that she had no idea that the FCC was in the process of making a decision on media ownership regulations until she read the article. Now, she had come to be opposed to further deregulation. She said after she did some research, she wrote a letter-to-the editor of the *Times Dispatch*, but it was not printed. Then she addressed Powell and said:

> Chairman Powell, I know that you wanted us to bring evidence and I'm just an individual and I want to ask what can we do as individuals or concerned citizens to help you guys fight the courts, to gather the evidence that you need to support our views? I could do a telephone survey or you know, would you like me to document all my media intake for a month? What can the public do to help you guys, because apparently you don't have enough time to get all the studies done together? I'm just trying to ask for help so that we can help you guys. (FCC, 2003h, p. 238)

Deborah Rannell expressed similar sentiments. She said she was a former teacher who did not know the issue of media ownership even existed before 2 weeks ago. Rannell said she was essentially clueless, but she came to the hearing to learn about the issue (FCC, 2003h). Rannell said her biggest fear as a mainstream conservative after listening to the panel discussions was that she was alarmed that if the regulations were relaxed further she would not be able to hear opposing viewpoints. Rannell said this was important to her for two reasons. First, she said if she was not exposed to other views she might not have the chance to reconsider the views that she did hold, and second, if she did not hear opposing viewpoints she could never be certain that the perspective she held was correct. Rannell closed her remarks by saying that the Commissioners were the stewards for her voice and she hoped that they made the right decision.

Anthony Mazza, who drove down from Philadelphia, remarked that he had heard 6 hours of testimony, with 20 minutes of public comment before lunch, 20 minutes after lunch, and now they were in the midst of another 20 minute public comment period (FCC, 2003h). He said that the format of the meeting was not a very good way of inviting the public into the process. He said that he heard testimony from representatives of Fox, Clear Channel, and NBC about how consolidation promotes diversity, but he had not heard one comment from a single member of the public at the hearing that was in favor of more consolidation. In fact, Mazza said he was wondering where all the representatives from the communities served by these corporations were. He said even the tobacco companies can trot out local citizens to say that they support smoking, but he had not heard from a single person who was not directly tied to the media industry say that they were in favor of media consolidation.

Several representatives from local unions spoke about the need for localism because their members had no other voice in national media (FCC, 2003h). Other participants spoke in favor of low-power FM as a hedge against further consolidation of local media. One volunteer from the Prometheus Radio Group reminded the audience that there are at least 42 different families of languages spoken in America, and 247 different ethnicities, and that the media should serve all of them. A few speakers derided Powell's comments about keeping emotion and politics out of the discussion, and Silver Persinger said although the marketplace of ideas might be an economic metaphor, it is also essential to political speech, which he claimed would be harmed by further consolidation in media.

Laura K. Smith, a doctorial candidate from the University of Texas at Austin, questioned the validity of the MOWG studies (FCC, 2003h). Smith said the studies lacked theoretical foundations basic social science protocols and were missing data and quality control mechanisms. Smith then went on relate her experience as a reporter for a television station that purchased another station in Jacksonville, Florida. Smith said the new owners fired most of the reporters at the second station but kept the entire sales staff. In essence, she said, the new station owners began to simulcast one news program on both stations. Smith predicted that if more duopolies were allowed, or if national caps on ownership were lifted, large station owners would go to regional newscasts that would further debilitate the concept of localism.

Other comments reiterated the same points; however the consensus was that the FCC should not move to relax media ownership rules further (FCC, 2003h). Many of the people who traveled to Richmond that day also were suspicious of the lack of coverage of ownership issues in the mainstream media.

After the hearing, Powell declared that there was no need for further input from the public given that the FCC had also already received some 15,000 comments on its website. When Copps suggested that the FCC was moving too quickly to modify its regulations, Powell said, " I just think the suggestion that this issue hasn't been explored and fully laid out and worked over is really naïve. I can go out and try to win the court of public opinion. But when it comes back from the court that matters, we've done nothing" (Shields, 2003b, p.3). Powell also suggested that he had not heard anything new at the hearing.

Summary

If anyone was being naïve, it was Powell. Although he and his staff and his fellow Commissioners may not have heard anything new from the panelists at the hearing, the people who attended the event and the people who were just learning about these issues, were hearing new information. While there may have been a limited proportion of the public that had the interest or expertise to fully evaluate the ramifications of FCC regulations, the vast majority of this key stakeholder group was affected by the media everyday, and several dozen cared enough about the issue to show up for a hearing in the middle of a snowstorm. As participants in the policy-making process, the public was less inclined to give credence to neoliberal economic theories than were the expert panelists in Richmond. Instead, the citizens who attended the hearing were more interested in how media ownership policy would affect them as citizens. Powell seemed to have forgotten that the Commission was charged with protecting the public's interest in addition to its obligation to meet the statutory requirements of Congress and the evidentiary demands of the courts. His tendency to discount the perspectives of the public as a relevant stakeholder group in the policy-making process may have obscured his judgment.

Additionally, the Internet was proving itself to be an effective tool for communicating opposition to media consolidation among a wide segment of the public that may not have had anything else in common. As interest in the issue heated up in early 2003, many organizations began to archive and distribute information on the topic (Chester, 2007; Klinenberg, 2007; McChesney, 2004a, 2004b).

After the Richmond hearing, a reporter asked Copps if he thought the meeting had been successful. His response was that he felt bolstered by the comments he heard (Shields, 2003b). The fact that he had persuaded Powell to hold the hearing in the first place was a feat in itself. Additionally, Copps said he was heartened that so many members of the public had come to the hearing to express themselves; this indicated to him that it was possible to get a national dialogue going on the subject of deregulation. Clearly people who had heard about the Commission's deliberations cared about these issues, a fact that was born out by a new poll from Pew Research that concluded that as more people learned about the issue, the more they expressed their dissatisfaction with consolidation in media ("Does Ownership Matter?" 2003).

CHAPTER 10

CONFLICTING COMMUNITIES OF INTEREST

After the Richmond hearing, Commissioner Michael Copps proceeded with his plan to hold public input sessions across the country (FCC, 2003d). Media activists and other public service organizations were also ramping up their efforts to inform the public about the potential changes in the media ownership regulations (Chester, 2007; Klinenberg, 2007; McChesney, 2004a). Although there had been very little coverage of the issue in the mainstream media prior to the Richmond hearing, a Pew Research study published in February 2003 indicated that the more people heard about the FCC's proposal to relax media ownership policies, the less they liked the idea (Layton, 2003; Rosenstiel, Chinni, & Avila, 2003). Even as antideregulatory forces began to win more support from the press, the public, and key Congressional representatives, Chairman Michael Powell refused to postpone the deadline again for public comments, saying that people had plenty of time to consider the issue and action had to be taken eventually (Powell, 2003a). However, despite the lack of publicity in the mainstream press, by June the FCC had received 500,000 comments from citizens and other interested parties and over 5,000 phone calls, more feedback than the agency had ever received on any issue under consideration in its history (Ahrens, 2003a; McChesney, 2004a).

Copps Hits the Road

Before the Richmond field hearing, Copps announced his intentions to schedule other hearings across the country, with or without his fellow Commissioners (FCC, 2003d). He wanted to hear how people who lived outside the Beltway felt about the potential relaxation of media ownership rules. Copps considered feedback from ordinary citizens to be an essential component of his decision-making process, even if his Republican colleagues did not share his concerns (FCC, 2003e). Seeking additional citizen involvement after extending the comment period once, in conjunction with the Richmond hearing, may have seemed like a superfluous move to the other Commissioners. Powell, in fact, had said as much (Klinenberg, 2007; McChesney, 2004a). However, between March and June, Copps or Adelstein, or both, would attend a dozen public hearings to discuss the proposed changes.

The first hearing took place in Seattle at the University of Washington (FCC, 2003c; Johnson, 2003; Scott, 2003). Several hundred people attended, some coming from as far away as the California bay area. Three panels of experts, including local representatives from the recording industry, broadcast affiliates, and labor organizers and journalists convened to discuss the impact of media consolidation on news, entertainment, and local programming. Copps began the meeting by informing the crowd and the panelists that a recent survey found that less than three fourths of all Americans knew that the media ownership rules were under review. Even though the FCC would not be paying for any more field hearings, according to Copps, it was better to have the discussions take place on a shoestring budget than not at all.

That day in Seattle, the panel discussions were at times contentious and the crowd was sometimes boisterous (Johnson, 2003; Scott, 2003). A number of broadcasters made the case for doing away with the media ownership rules altogether. For example, Dave Lougee, an executive for the Belo Group that owned two Seattle television stations, said that having both stations in one market allowed him to cut overhead and devote more time to local news. He also said that if his stations were not offering a quality product, the audience for both stations would not be as large and as loyal as they were. Lougee claimed that due to increased competition among various media outlets, some small towns were in danger of losing their only local stations unless they were permitted to merge with larger corporations. Becky Brenner, a program director for two country music stations owned by Infinity, said that listeners were better served by large radio station groups that could offer several formats in a single market. Brenner said that her company featured acts like Shania Twain, the Dixie Chicks, and Faith Hill on a variety of formats, which proved their diverse appeal. Brenner's remarks were met by some of the aforementioned boisterousness. One local music promoter asserted that more formats do not necessarily equal more diversity. Other broadcasters argued that their stations provided excellent community coverage. Even when owned by a distant corporation, their staffs were local, and no one from headquarters decided what not to cover or which stories should run. However, Ben Tucker, president of the Seattle-based Fisher Broadcasting Company, said that he opposed relaxing national ownership caps because it would decrease the amount of autonomy network affiliates had. Additionally, Alan Bushong, director of a community television station in Salem, Oregon, said that in his small town there were only three AM radio stations, no FMs, and no network television. He felt that allowing more consolidation would break up the limited amount of media diversity that Salem residents currently enjoyed.

One of the most prominent members of the local media on the panel was Frank Blethen, publisher of the *Seattle Times* (Johnson, 2003; Scott, 2003). He was vehemently opposed to any further relaxation of rules that would allow cross-ownership arrangements within any given market. Although he said cross-ownership would make sense economically for his own newspaper, it would not make sense from a public service perspective.

Of the 50 or so members of the audience who were allowed to comment on the issues under discussion, not one of them spoke in favor of further consolidation in the media. One audience member, Alan Stavitsky, associate dean of the University of Oregon's School of Journalism and Communication, said that many of the companies that bought radio stations after 1996 cut newsroom staff as a way to quickly boost profits (Johnson, 2003; Scott, 2003). He claimed that some of those stations relied on news programming produced elsewhere. David Meinert, a local music promoter, said that the Telecommunications Act had led to greater homogenization on the radio, which made it harder for local bands to get airplay, and consequently made it nearly impossible for new bands to receive national exposure. The Seattle City Council and the Seattle Educational Association also weighed in with their opposition to further consolidation, saying in a prepared statement that media consolidation had failed to deliver newscasts that covered local issues in depth.

On March 31, Duke University Law School sponsored a field hearing that both Copps and Adelstein attended (FCC, 2003k; Lewis, 2003). They invited local media owners to sit on three different panels that were scheduled to address localism, competition, and diversity. The public was also encouraged to attend the sessions. Congressman Richard Burr-R, vice-president of the House Energy and Commerce Committee, which has jurisdiction over the FCC, and Congressman David Price-D, made it clear that they were strongly supportive of localism. Both representatives voiced their concerns about the possibility of more deregulatory moves by the FCC. Before the meeting, Burr issued a press release that went on at some length about the issue (Burr, 2003).

Burr insisted that as an author of the Telecommunications Act of 1996, "it was not our intent to establish a higher standard for retaining a rule than was required for adopting it" (Burr, 2003, p. 3). He also identified himself as a free market conservative who felt that retaining the current media ownership restrictions was the only way residents of North Carolina could ensure that their own local values were upheld. Burr decried what he called a "moral failure" at the national network level, citing programs such as *Who Wants to be a Millionaire? Who Wants to Marry a Millionaire* and *Who Wants to Marry my Mom*? He said that if large national companies were allowed to consolidate further, local station owners would not have the option of preempting network programming that might be offensive to their own communities. Although Burr clearly stated that he was opposed to government censorship, he said that he supported the current system whereby local citizens could work with local broadcasters to provide programming that was responsive to their communities. Burr also took a swipe at the Public Broadcasting Service, saying that it was trying to "nationalize" programming and preempt local public broadcaster's decisions. He accused the Corporation for Public Broadcasting of not doling out enough money to small local stations.

Approximately 150 people turned out at Duke to hear what Copps, Adelstein, and local broadcasters had to say and to join the discussion (Cox, 2003; Lewis, 2003). About two dozen members of the public made comments after the panels ended, and again, not one of them was in favor of more regulation. Additionally, of 11 local broadcasters and musicians who sat on the panels, only 2 spoke out in favor of further deregulation. Michael Ward, president and general manager of WNCN, an NBC affiliate, said that the current rules cannot govern station content or conduct and therefore do not allow stations be more responsive to their viewers. He said that only a corporation with a large amount of financial resources could offer better community service. Barry Farber, general counsel of Sinclair Broadcast Group, agreed that stations should be able to pool their resources in order to provide more information in different formats. Orage Quarles III, publisher of the *News and Observer* in Raleigh, North Carolina, spoke out in favor of relaxing the newspaper/broadcast cross-ownership ban because the nature of the media landscape had changed tremendously over the past 20 years. Therefore, the FCC needed to make sure that newspaper owners could operate on a level playing field with broadcasters.

However, the vast majority of both panelists and members of the public agreed that further deregulation would be a negative development for their communities and for the nation (Cox, 2003; Lewis, 2003). Jim Goodmon of Capital Broadcasting, Jim Heavner of Vilcom, and Don Curtis of Curtis Media Group, all local broadcasters, argued that deregulation had already eroded the concept of localism. Heavner said that deregulation was a “disaster for the public interest” (Lewis, p. C1). William Sutton, past president of the National Association of Black Journalists and deputy editor of the

Herald-Sun (Durham, North Carolina) said that 98% of radio stations had news operations in 1982; however by 2003, that number had dropped down to 67%. Sutton blamed consolidation for the loss of news operations on radio as well of the loss of jobs for Black journalists (Lewis). Tift Merritt, a local singer-musician, said that despite her appearances with Willie Nelson and on the Country Music Television, she could not get airplay on local stations. Others brought up the danger of consolidation in light of a story that appeared in the *New York Times* in March that reported a chemical spill in Minot, North Dakota that injured over a hundred residents (Klinenberg, 2007; Lee, 2003). When emergency responders tried to call their local radio stations to provide an alert, there was no one actually on location because the stations were running syndicated programming. Another audience member brought up the Dixie Chicks incident when singer Natalie Maines told a London audience that she was ashamed to come from the same state as President Bush. Subsequently, Clear Channel banned the Dixie Chicks from their play-lists. Mike Elkin said that news stories represented the ban as a grassroots effort when in reality, the management of the corporation actually instigated it. Adelstein urged the crowd to keep writing Congress and thanked everyone for their time.

Several other hearings were held between March and June, and Copps or Adelstein, or both, attended the majority of them (Fallows, 2003; Klinenberg, 2007; McChesney, 2004a). Some, like the hearings in Chicago and Duke University, were only attended by approximately 100 people, whereas others, such as those in Seattle, Los Angeles, and San Francisco were standing room only affairs (Chester, 2007; McChesney). All told, there were hearings in the aforementioned locations as well as in Tempe, Arizona; Detroit; Philadelphia; and Colchester, Vermont. All across the country, ordinary citizens, as well as professionals in the creative fields, including small broadcasters and local representatives, were taking the time to show up at hearings to express their opposition to further consolidation in media. This was an extraordinary turn of events given that FCC policy was generally considered an archaic stronghold of faceless policy wonks and cloistered academics (Halonen, 2002).

Repeatedly, panelists and citizens complained that the quality of radio was adversely affected by the relaxation of ownership rules that had been permitted after the passage of the Telecommunications Act. Broadcast employees and union representatives complained that consolidation resulted in lost jobs and less local news. Musicians and listeners complained that tight corporate play-lists excluded new artists and restricted airplay for local acts, which created homogenized programming across media markets and throughout the nation. Hearing attendees insisted that there was less coverage of public affairs than there was before the act. Small station owners complained that corporations that consolidated their holdings were able to offer more favorable advertising rates across several stations in one market. Consequently, small stations were being squeezed out of the market. The consensus reached by those who attended these hearings was that radio was indeed the “canary in the coalmine,” and if television, cable, and newspapers were allowed to follow suit, it would be disastrous for communications policy and the marketplace of ideas.

Commissioner Copps continued to speak out ceaselessly in favor of public involvement, and it was apparent that citizens were listening. They were also willing to take action. Meanwhile, other organizations began to encourage their members to make their voices heard.

Coalitions Merge

Toward the end of 2002, Robert McChesney, John Nichols, and Josh Silver formed an organization named Free Press to increase public participation in media policy (Free Press, n.d.). Originally, they conceived it as a project of the Media Education Foundation to educate the public about the debate over media ownership. By the following August, Free Press was a fully incorporated nonpartisan, nonprofit organization. Almost immediately, Free Press was instrumental in the distribution of information over the Internet that supported maintaining existing media ownership regulations (Chester, 2007; Free Press, n.d.; Klinenberg, 2007). One of the organization's first projects was to design a website that functioned as a repository of information about media policy and activists groups around the country. The organization also delivered daily newsletters updating readers on media issues, and they provided information about other groups working to reform media. The goal of the organization was to educate, organize, and advocate for media reform. In 2003, it played a major role in organizing activists and in uniting them on common ground. By February 2003, the coalition that Free Press helped coordinate was gaining strength.

While many other organizations that had traditionally been concerned with media matters were instrumental in building public opposition to the relaxation of media ownership rules, other groups not primarily focused on media matters were hearing from their members on the issue. In 2003, Common Cause made media consolidation its central organizing issue for the year, and it invested $250,000 in an advertising campaign opposing further consolidation in media (Kirkpatrick, 2003; McChesney, 2004a). By the end of November 2002, MoveOn.org, founded in 1998 by two Internet entrepreneurs, had become one of the fastest growing political action committees in the country. It joined the chorus opposing media consolidation as well (Cochran, 2003; “MoveOn,” n.d.). With only seven staff members and no physical office, MoveOn.org had amassed a mailing list of 1.8 million. When MoveOn.org launched its campaign opposing the proposed new rules on the urging of its members, it was able to significantly influence the public discourse by raising funds and promoting the cause over the Internet. By the end of May, MoveOn.org alone had collected 170,000 signatures on a petition to the FCC asking the agency to retain its current ownership rules (Ahrens, 2003a).

During the spring of 2003, another somewhat unlikely organization jumped on the antideregulatory bandwagon. The National Rifle Association (NRA) urged its members to send postcards expressing their dissatisfaction with media consolidation to members of Congress and the FCC (Beckerman, 2003; McChesney, 2004a). Approximately 300,000 NRA members responded to the call. Just as the more liberal end of the anticonsolidation activist spectrum feared that media moguls with a conservative slant could disproportionately influence the public because of its large media presence, the NRA feared that corporate media was biased against its own cause. The United States Conference of Catholic Bishops was also opposed to any changes in media ownership rules. Francis J. Maniscalo, director of communications of the United States Conference of Catholic Bishops, said that his organization was concerned about the loss of localism and broadcaster’s responsiveness to their communities of license. Maniscalo explained that his organization understood that U.S. media were a foundational block on which modern culture was moored. He feared that if more consolidation were permitted, there would be less coverage for religious programming and other issues important to the Catholic Church.

Maniscalo expressed his view that when any group became marginalized in the media, there was a risk that they would then be viewed as a less important segment of society than were those that were featured more prominently. Other conservative groups also joined the coalition. As previously mentioned, the Parents Television Council and like-minded groups, such as the Family Research Council, opposed media consolidation because of television's unremitting vulgarity which they blamed on the corporate quest to satisfy their stockholders (Klinenberg, 2007; Safire, 2003a).

Most professional journalism associations were opposed to any further loosening of media restrictions (Fallows, 2003; Holland, 2003; Johnson, 2003; McChesney, 2004a). The National Association of Black Journalists and the National Association of Hispanic Journalists opposed relaxing ownership rules. The International Federation of Journalists, The Newspaper Guild, The American Federation of Television and Radio Artists and the Hollywood unions all opposed the proposed changes. The *Columbia Journalism Review,* among other trade magazines, featured stories by working journalists who were also opposed to deregulation (Beckerman, 2003; Hickey, 2003a).

William Safire, the man who coined the phrase "nattering nabobs of negativism" for a speech given by Vice President Spiro Agnew during the Nixon Administration, had become one of the most influential conservative editorialists for the *New York Times*, the most widely read newspaper in the world. Safire was unequivocally opposed to any relaxation of media ownership rules (Safire, 2002, 2003a, 2003b, 2003c, 2003d, 2003e, 2003f, 2003g). He wrote several editorials in 2003 disparaging, in no uncertain terms, Powell's arguments for relaxing the rules. In one January column, Safire explained why he, a conservative, was opposed to allowing large media companies, such as the one he worked for, to expand their holdings. He quoted Powell who said that "the market is my religion" and went on to write that "conservative economic religion is founded on the rock of competition, which—since Teddy Roosevelt's day—has protected small businesses and consumers against predatory pricing leading to market monopolization" (Safire, 2003a, p. A19). Safire said that media consolidation forced those seeking to air political advertisements to depend on the networks with their unmatchable costs per thousands of viewers, and he asserted that the highly touted competition that emerged from new technologies was an illusion. Safire told his readers that the same few companies that dominated broadcasting also dominated cable programming and the leading Internet sites. Safire pointed to radio as an example of the dangers of deregulation and said that the state of the radio industry showed that media mergers have narrowed the range of information and entertainment available to people of all ideologies.

Safire kept writing about media consolidation on the op-ed page of the *New York Times*. At the end of May, just before the FCC vote on the new rules, he decried the secrecy that dominated the process and accused the FCC of abdicating its responsibility to uphold the public interest. According to Safire, although we have more channels for communication, we have fewer real choices today because the ownership of those channels is shrinking.

> That's why I march somewhat uncomfortably along side CodePink Women for Peace and the National Rifle Association, between liberal Olympia Snowe and conservative Ted Stevens under the banner of "localism, competition and diversity of views.' That's why too, we resent the conflicted refusal of most networks, stations, and their putative purchasers to report fully and in primetime on their owners' power grabs scheduled for June 2." (2003d, p. A19)

Barry Diller was the keynote speaker at the April convention of the NAB in Las Vegas, and he made it clear to his audience that he was dead set against any relaxation in media ownership rules (Bloom, 2003; Orol & Lauria, 2003). Diller, the chair of *USA Interactive* and the former head of the *Fox Network*, said he was opposed to any rules that could potentially increase the financial reach of the networks. He said it was a mistake to eliminate the Fin-Syn Rules and pointed out that 10 years ago, there were 16 new independently produced programs being broadcast on the networks during primetime, and by 2002 there was only 1. “The barrier is so high that the ability of new entrants to go into the market has been eliminated. The possibility of a new *Fox Network* today is nonexistent” (Bloom, 2003, p.18). He was also opposed to the relaxation of the national cap on ownership. Diller argued that broadcasters have the unique responsibility of upholding the public interest, and he clearly stated that he did not believe that more consolidation was in the public’s interest. A few weeks later, Diller told Bill Moyers on *NOW* that a handful of companies, an oligarchy, controlled most everything both vertically and horizontally that one can see on a television screen (Moyers, 2003). A week before the FCC vote on the ownership rules, Diller appeared on *Nightline* with Commissioner Adelstein to express their views on the proposed new rules, although Powell backed out of his commitment to appear at the last minute (Lieberman, 2003).

In early February, after being demoted from his position at AOL-Time/Warner, Ted Turner resigned from the company that he helped found (Jonsson, 2003). According to Jeff Chester, Turner recognized that big media mergers had a destructive effect on the quality of news and entertainment programming, and he later said that he could never have started CNN in the current media market (2007). In an editorial published a few days before the FCC was to decide on the new rules, Turner wrote that large media mergers prevented small independent broadcasters from competing in the market and said, "when you lose small businesses, you lose big ideas" (2003, p. A23). Turner wrote that big media companies were in the business of making money for their shareholders, but if the FCC did not protect the public interest, it would not be served. The larger the company, the more unwilling its executives are to take risks. According to Turner, fewer media owners amounted to less diversity and less of a chance for democracy to flourish.

As opposition to the proposed rule changes mounted, the press increased its coverage of the issue. However, Bill Moyers, host of *NOW*, had been covering the debate over media consolidation since early in 2002. During 2003, when the debate became more heated, Moyers ran 8 segments on media consolidation, sometimes devoting the entire hour length of his show to examining the arguments in favor of and opposed to media consolidation. Additionally, Moyers presented his own views on the subject in his *Bill Moyers' Journal* segment and interviewed Commissioner Copps, Barry Diller, Robert McChesney, John Nichols, and Chuck Lewis from the Center for Public Integrity. *NOW* frequently ran investigative reports on the proposed rule changes during this time period, and supplemental information about the subject was posted to *NOW's* website.

In April, a majority of the Senate Commerce Committee sent Powell a letter asking him to delay the vote, and House Republicans led by Billy Tauzin sent a letter to Powell urging him *not* to delay the vote (Alpert, 2003; Pelofsky, 2003). In early May, both the House and Senate held hearings on the topic. Legislators in both houses introduced bills to require the FCC to retain the 35% cap on national ownership limits. Cards and letters from individuals and those affiliated with public service organizations flooded the FCC's website and mailboxes (Beckerman, 2003; Mulkern, 2003). At this point, neither Congress nor the Democratic Commissioners had seen a draft of the proposed rule changes recommended by the FCC staff, although some of the provisions were leaked to the press. The vote would go forward on June 2, despite the objections of Copps, Adelstein, and a half a million citizens that sent letters to the FCC. *CongressDaily* reported that a majority of Senate Commerce Committee members including Olympia Snow R-ME; Byron Dorgan, D-ND; Earnest Hollings D-SC; Trent Lott R-MS; and John Jay Rockefeller D-WV again sent Powell a letter urging him to delay the vote so that the public could have more time to review the proposed changes. "Openness in this process is the best way to proceed to ensure that Congress and the public support the agency's decision" (" Lawmakers Decry," 2003, p. 11). Still, Powell refused to extend the deadline. Meanwhile, the press reported, and Powell confirmed, that a new Diversity Index would be employed by the Commission to determine if a media merger would be allowable in most markets.

The Diversity Index

Electronic Media first reported in March that Powell, in conjunction with Media Bureau Chief Kenneth Ferree, was in the process of creating a so-called diversity index that would rely on mathematical formulas to guide the agency in its determination of whether or not to allow media mergers in different markets (Davidson, 2003c; Halonen, 2003b; Hearn, 2003a). According to Powell, the index was based on the Herfindahl-Hirschman Index used by the Department of Justice (DOJ) to determine if there was enough competition between businesses in a product market. Theoretically, such a model would provide an objective analytic tool for the Commission that would stand up to court challenges. Instead of basing their evaluations on the number of specific media outlets in a given market, the new formula would assign each medium a numerical value, and the level of competition in each market would be assessed across the media spectrum. The new index required the FCC to take a census of all media outlets in every market. The index, therefore, could conceivably allow more mergers than the previous rules would ("FCC: Chair Backs Index," 2003; Wigfield, 2003). However, the assignment of numerical values would still be a subjective process, as Ferree reluctantly allowed. Someone still had to rate how much value translators importing signals were figured into the mix, let alone if a weekly shopper circulated in a small town would be counted.

Powell and Ferree emphasized that the Diversity Index (DI) was still a work in progress and that they did not expect to deliver the draft *Report and Order* to the Commissioners until May 12 (Hearn, 2003a). Industry analysts and lobbyists were skeptical of the plan at best. The newspaper industry was concerned that such a formulation would result in a complicated market-by-market analysis that would slow deals and invite lawsuits (Wigfield, 2003). Legg Mason media analyst Blair Levin, a former FCC chief of staff, told his clients that the DI would likely be softened. As he understood it, " FCC lawyers have concluded that if the agency relies too heavily on the diversity index, it would need to seek public comment on such a market measuring device" (Hearn, p. 36).

Fellow Commissioner Kevin Martin also expressed reservations about imposing the index at the NAB convention. " I guess I would say it this way: I am concerned about a complicated mathematical formula as a new rule....I think the rules in the end should be simple" (Hearn, 2003a, p. 36). Powell insisted that the Court was requiring the Commission to provide stronger empirical evidence to support ownership restrictions. He added that industry lawyers might want to bone up on their knowledge of integers, constants, and variables. However, Powell promised that the DI would not be a Rube Goldberg contraption and that "this is being portrayed as way more complicated and way more sophisticated and its mythology grows as the proceeding continues....I don't think there is anything that sophisticated or complex around the idea" (Hearn, p. 36). At the same convention Abernathy and Adelstein offered their opinions that a DI might give the rules an across-the-board consistency and ability to provide case-by-case analysis on media mergers. However, Copps remained adamant that the FCC had not had enough time to answer key questions about the potential effects of relaxing media ownership rules. He did not think the Commission had time to gather all of the needed data, although at another panel discussion, Ferree insisted that the agency would not delay the vote (Albiniak, 2003). At this point, no one except FCC staff members had actually seen the fabled index.

A few weeks after the existence of a DI was made public, Mara Einstein, the author of *MOWG Study #5: Program Diversity and the Program Selection Process on Broadcast Network Television*, wrote an editorial for *Broadcasting and Cable* that denounced the FCC's efforts to rely on purely quantitative methodology to determine diversity (Einstein, 2003). Einstein said that even though quantitative studies have value, and her own study was grounded in them, she stressed that the FCC needed to place these kinds of studies in context. She said that her own research suggested that consolidation does not necessarily lead to a decrease in the diversity of entertainment programming; however, it did not say anything about the news. Einstein also argued that her study was designed to open the discussion about the underlying assumptions in FCC policy-making process, specifically the assumption that diversity is a worthy goal. She said that the FCC had never fully defined the term diversity and that her study was an attempt to provide a basis for a succinct definition.

Furthermore, she said:

> With all due respect to the FCC, quantitative measures should not be seen as the be all and end all in determining whether to ease the media-ownership rules. Much of the statistical information in front of the commission is provided by the industry, a decidedly biased group. While my work is not biased (though I have been accused otherwise), I implore the commission to examine it within its appropriate context. It is meant as a work that blames advertising for many of our current woes, not as a means to put even more power into the hands of a select few. I would like to see this research used as it was meant to be used: As a means to stimulate wider discussion on media ownership, media diversity and the underlying economics that guide media content. The FCC says it will decide by June 2. That's simply too soon, given the lack of broad public debate. With the $70 billion giveaway that was the 1996 Telecom Act, it is time for the networks to give back. (Einstein, 2003, p. 50)

According to *Broadcasting and Cable*, the most contentious issue over the rules was the lifting of the national ownership cap (Albiniak, 2003). Networks wanted to raise or eliminate the 35% limit; however, station affiliates wanted the rule to remain in place as a check on network power. Predictions about the outcome of the vote varied widely. Levin predicted that the FCC would loosen TV duopoly rules and raise the national cap. Communications attorney Wade Hargrove predicted that local markets for radio stations would be redefined. However, the only consensus about these issues that arose, was that no matter what the FCC decided to do on June 2, there would be no one who was completely satisfied.

The Fur Flies

During the Senate hearings held in early May, Copps and Adelstein expressed their frustration with their lack of access to information on the media ownership review. Although Powell claimed that each Commissioner had been consulted equally, Copps told the senators, “We don’t know what we’re going to be working on. It’s like a state secret” (Ho, 2003b, p. 1). Both Democratic Commissioners urged Powell to make the FCC’s findings on media ownership public, but Powell refused to do so (FCC, 2003b; FCC, 2003e). By law, he was required to give a draft copy of the staff report to the entire Commission 3 weeks in advance of any decision, and Powell stuck to the letter of the law. All five Commissioners received a copy of the 258-page Report and Order on May 12. Copps immediately requested a 1-month extension on the decision so that he could study the findings, but Powell insisted that it was imperative to proceed in a timely fashion because the court had already disqualified some key ownership rules (Shields & Bachman, 2003). According to the *Atlantic Monthly*, White House political strategist Karl Rove met with Powell in May to urge him to wrap up the proceedings as quickly as possible (Fallows, 2003). As some of the FCC's staff findings leaked to the press over the next few weeks, the conflict over media consolidation intensified. Finally, the press was covering the issue extensively, and as more people heard about the new rules, the more likely they were to oppose them (Layton, 2003; "Strong Opposition Emerges," 2003).

At a luncheon sponsored by the Media Institute in Washington, DC, Adelstein accused the majority of "McDonaldizing" the media, and he predicted that supersizing the media would bring on widespread consumer heartburn (2003a, p.6). Adelstein was just warming up when he said, "once we place our order...we'll all have to digest what comes our way. And the public may be about to experience a giant Maalox moment" (p. 9). Adelstein accused Powell of drafting an extremist proposal that would lead to a tsunami of mergers, and he told his audience that they could expect a public backlash if the proposed rules were approved on June 2. According to a report in *Daily Variety*, many of the members of the audience, most of whom stood to benefit from relaxation of the ownership rules, silently shook their heads in disagreement ("Fight

Looms," 2003). Ex-FCC Chairman Richard Wiley disagreed with Adelstein. He said that cross-ownership limits between a TV station and newspaper in the same market frequently results in more local news coverage, not less, and he expressed his view that more growth in the industry was needed. Wiley stressed that broadcasters now had to compete with many other delivery systems, and, therefore, relaxing the rules could level the playing field.

A week before the Commission vote, Copps and Adelstein hosted a public meeting for more than two dozen organizations including socially conservative groups such as the Parents TV Council and the Family Research Council (Gentile, 2003). There were also representatives from the Catholic Conference of Bishops and the United Church of Christ in attendance, as well as minority journalism groups, telecommunication union representatives, consumers, and network-affiliated broadcasters (Enrich, 2003). The discussion took place amidst a backdrop of mail baskets containing 250,000 postcards from NRA members, and a petition signed by approximately 150,000 individuals from the general public (Ho, 2003b; Linder, 2003). During the meeting, the presidents of the National Association of Black Journalists (NABJ) and the National Association of Hispanic Journalists (NAHJ) were particularly outspoken about the damage that increased media consolidation could inflict on minority groups. Both groups urged the FCC to postpone the vote so it could study the effects that any changes in the rules would have on communities of color. Responding to a report issued by the Center for Public Integrity that documented the number of trips and junkets taken by Commissioners, Gonzales, president of NAHJ, said that Chairman Powell had taken 44 trips mostly paid for by the telecommunications and broadcast industries. According to Gonzales, this left the public with the perception that only powerful media executives and conglomerates had access to the Commission and that citizens' wishes will be relegated to the sidelines. By this time, the FCC had received hundreds of thousands of e-mails and postcards protesting any changes in the media ownership rules; however Powell asserted, “You don’t govern by just polls and surveys. We have to exercise difficult judgments and abide by the law. If all of our rulemaking was a case of put them out and take a referendum, things would be a lot easier” (Ahrens, 2003a, p.3).

On the weekend before Monday’s decision, small groups of protesters marched in several cities across the nation (Campbell, 2003; Gentile, 2003). In Los Angeles, about 60 people organized by CodePink picketed a local Clear Channel station with signs that read, “No Choice, No Voice: Reclaim Our Airwaves.” In Pittsburgh, about a dozen people protested outside of another Clear Channel station, and in New York, about 150 people picketed WWPR, yet another Clear Channel station. However, Clear Channel was not the only target of protesters that weekend. A $250,000 advertising campaign paid for by Common Cause, MoveOn.org, and Free Press ran spots in the *New York Times*, the *Washington Post*, and *Daily Variety* and on the *Fox News* Channel in New York (Fallows, 2003; Kirkpatrick, 2003). The ads featured Rupert Murdock with a banner over his face that read, “ This Man wants to Control News in America. The FCC wants to help him.” Apparently, Murdock had become the poster boy for media consolidation (Fallows).

Out With the Old, In With the New

On Monday June 3, 2003, a line of activists, reporters, and paid placeholders stood on line outside of the FCC Building in Washington, DC to watch the FCC’s long-scheduled vote on media ownership (Fallows, 2003). At 10:00 A. M., Powell struck his gavel and called the meeting to order. The staff presented the Commissioners with a report that ratified a deregulatory agenda, and then Powell gave a 10-minute speech endorsing the changes (Powell, 2003d). Copps and Adelstein spoke twice as long as Powell did, and both emphasized their dissenting opinions (Adelstein, 2003b; Copps, 2003a, 2003d). Martin spoke next and said there were strong arguments on both sides of the issue, but in the end, he gave his vote to the majority (2003b). Powell then took the official vote, and the biggest change in the history of media ownership policy was approved. Security guards had to hustle a small group of protesters from CodePink out of the room. Dick Gregory and Jesse Jackson gave interviews to the press outside of the building where dozens of protesters had congregated waving placards with the Rupert Murdock's image on them. The Senate Commerce Committee summoned the Commissioners to its chambers for a meeting to take place 2 days later.

The Report and Order that the Commission voted for on June 2, 2003, modified, repealed, and revised existing media ownership rules (FCC, 2003i). The majority voted to approve raising the National Television Ownership Rule to 45%, up from 35%, and to maintain its 50% discount on UHF stations. They voted to retain the Dual Television Network Rule. Additionally, the Commission voted to repeal both the Television/Newspaper and Radio/Television Cross-Ownership prohibitions and replace them with a single set of Cross Media Limits that were also applied to the Multiple Television Ownership Rule and the Local Radio Ownership Rule.

National Television Ownership Limits

The Report and Order was voluminous and convoluted. The justification for raising the national cap on ownership was rooted in the court's decision in *Fox Television Inc. v. FCC* (2002). The gist of this argument was familiar terrain. According to the report, the current rule, in place since the passage of the 1996 Telecommunications Act, had encouraged tremendous innovation in the communications industry. The report said that the increase in the national limit from 25% to 35% had created opportunities for the public to access new options such as local all-news channels, and new program formats were now available via DBS, cable television, broadcasting, and the Internet. Additionally, the transition to digital television represented a critical evolutionary step in broadcast television. This development could best be exploited if there were more group owners that had the wherewithal to explore innovative uses for the spectrum. Since the networks have different economic incentives to use the spectrum, i.e., higher programming production costs than local television stations, the networks might want to use digital spectrum space in different ways than its local affiliates. The report concluded that the networks and other large station owners needed more incentives so they could gain the economic efficiencies that would be required for them to consummate their goals. The report also concluded that raising the cap to 45% would not appreciably harm affiliated television stations any more so than had the 35% limit.

The report declared that the National Television Ownership Rule did not appear to be relevant to the goal of promoting diversity "because people gather news and information from sources available in their local market and that the relevant geographic market for view point sources is national, not local" (FCC, 2003i, p. 209). Therefore, there was no compelling evidence to suggest that raising the national ownership cap would affect diversity. However, the report found that some cap on national ownership was necessary to promote localism, and it was determined that 45% was a reasonable number. Since national audiences for network programming were eroding due to the reach of new video delivery systems, it was important for the networks to be able to compete for large audiences. If networks could not reach large audiences, their revenue would fall, and the public would have access to less quality programming and the possibility that free over-the-air television would disappear from the media landscape.

Dual Network Rule

The Commission voted to uphold the Dual Network Rule that prohibited ABC, NBC, CBS, or FOX from merging with each other (FCC, 2003i). This rule only applied to those network broadcasting operations. There were no restrictions placed on mergers with cable networks, or any other group owners. The Commission reasoned that this rule was necessary to protect the national advertising market, and it was necessary to retain the balance of power with the networks and their affiliates. Therefore, according to the report, localism would be protected. However, this logic was in direct contrast to the decision to raise the national ownership limit. When voting to expand the national limit on ownership, the FCC said a 45% cap would not affect that balance of power between the networks and their local affiliates. However, in this section of the Report and Order, the Commission found that the Dual Network Rule did, in fact, protect the public interest in terms of competition and localism. The Commission also asserted that diversity of viewpoint was irrelevant to the discussion of this rule.

Local Television Multiple Ownership Rule

In the introductory section on the Local Television Multiple Ownership Rule, the FCC maintained that the existing local television rule was based on the flawed assumption that only local television stations contribute to viewpoint diversity in local markets (FCC, 2003i). Therefore, it was the duty of the Commission to correct this error and account for all media available in the market when determining if the rules were necessary to promote the public interest. It was also necessary to reevaluate the way the FCC determined the boundaries of local markets to make them more accurate. After issuing a Notice of Proposed Rulemaking after the previous biennial review, the FCC determined that the old method of configuring a designated market area (DMA), based on how far a broadcaster's signal carried, was inadequate. The Commission changed its methodology to conform to A.C. Neilsen's method of measuring markets based on geographic locations, rather than by measuring signal contours. The Commission rationalized that since a DMA is the market in which a digital audio provider competes, a geographical measurement would be more appropriate. The FCC grandfathered in existing stations that did not conform to the new method of measuring markets. Since only 70% of the country fell into A.C. Neilsen's DMA listings, the Commission stated that the new measurement system would have to be applied to the remainder of the country after further study.

The Report and Order concluded that the current Local Television Multiple Ownership Rule could not be justified under §202(h) of the Telecommunications Act of 1996. Therefore, it modified the rule to permit an entity in markets with 17 stations or less to own up to two television stations in one market. Additionally, if a market consisted of 18 or more television stations, one entity could own three stations. There was one caveat though; the Commission prohibited combinations where one of the stations rated among the top-four in a market. That meant that there could be no combinations allowed in markets with five or fewer stations. However, if one owner acquired a second or third station in a market that conformed to the modified rule, that owner would not be required to divest a station if the market subsequently declined below the level consistent with the outlet cap or if more than one station subsequently became a top-four ranked station in the market.

The rationale for revising the Eight Voices Rule was based on the agency's interpretation of the *Sinclair* case (2002). After remanding the issue back to the FCC, the Court noted that the Eight Voices Rule was inconsistent with the FCC's own definition of voices in its Radio/Television Cross-Ownership regulations. In that ruling, the FCC determined that newspapers and cable stations counted as voices; therefore the court suggested that the agency reconcile this inconsistency and perhaps place a numerical limit on these rules. Consequently, the Commission concluded that the Eight Voices Rule could not be justified under §202(h) unless all available media in a given market were counted.

The FCC supported this argument by asserting that the Eight Voices Rule actually prohibited firms from realizing economic efficiencies in mid-to-small-size markets and therefore prevented potential combinations from better serving the public with better quality programming (FCC, 2003i). The agency reasoned that there were three different markets served by local markets. The first and most important consideration should be the Delivered Video Programming (DVP) market because this is the element of the local marketplace that most affects consumers. Although the Report acknowledged that most consumers would not substitute video watching for reading books or magazines, it insisted that there was still a bountiful array of video entertainment options for the consumer to choose from if it counted all video delivery systems in a locality. Therefore, allowing more consolidation in local markets would not harm competition in the DVP because the number of households that subscribed to cable kept increasing. If the price was too high for consumers, it should result in less video viewing. Since the amount of viewing time for video had increased, not decreased, over time, this indicated that the public was not suffering from a lack of competitive pricing. As a result, the Commission concluded that cable and television are good substitutes for each other and that the competition between them was adequate to support relaxation in local television ownership rules.

On the topic of local advertising markets, the FCC defended the relaxed rules by asserting that local television broadcasters would not unilaterally increase advertising prices because of increased market power (FCC, 2003i). This was a failed assumption because broadcasters adjusted their rates if they knew that an advertiser had a good substitute for television commercials. Television station owners sold spots based on individual needs rather than by setting prices across the board, according to the comments made by Belo and Sinclair; thus, the agency rejected the findings of Brown and Williams' (2002) study, *Consolidation and Advertising Prices in Local Radio Markets*. The report also disputed claims that local video production markets might be harmed by further mergers; instead the Commission concluded that there were more markets available for sellers via new video delivery systems than there were when the rule was first promulgated.

In one paragraph, the Commission stated that the adoption of The Multiple Television Local Ownership Rule was not predicated on the promotion of localism (FCC, 2003i). According to the report, the FCC relaxed the duopoly rule in 1999 on the assumption that it would lead to increased economic efficiencies and that commonly owned stations were more likely to produce more local news. The Commission found that there was no danger that more mergers in local markets would reduce local control of content, contrary to the assertions made by the AFL-CIO and AFTRA. Although the FCC rejected the unions' claims, it relied on anecdotal evidence to support its own assertions.

The FCC was not worried about any effects on viewpoint or programming diversity that could result from relaxing this rule (FCC, 2003i). The Commission again stated that the modifications to the Multiple Local Television Rule would increase diversity rather than harming it by increasing competition among video delivery systems. It explained the threshold for calculating diversity in local markets was based on the HHI index used by the Department of Justice and the Federal Trade Commission to determine if a merger is acceptable. When a market for a given product is deemed moderately concentrated, it will obtain a score of 1800 on the index. The FCC decided to lower its own threshold to 1000 because of competitive pressure from cable television and because the market for television programming is always in flux depending on which new show is most popular to the public at any given time. The Commission added that since the number of licenses that a corporation controls is a measure of its capacity to control programming, that limit would also prevent undue concentration.

Local Radio Ownership Rule

The FCC concluded that numerical limits on radio station ownership in local markets were necessary to the Commission's obligation to serve the public interest (FCC, 2003i). However, the agency decided that the current configuration of markets based on signal reach was flawed and thus did not promote competition. The old rule did not account for noncommercial radio stations, so the FCC revised the new rule to include them.

In order to determine if the number of stations in a local market could meet the §202(h) test, the Commission decided it would be appropriate to break down local radio service into three product definitions: radio advertising, radio listening, and radio program production. The first component that the Commission discussed was radio advertising. The agency relied on data used in *MOWG Study #10*: *On the Substitutability of Local Newspaper, Radio, and Television Advertising in Local Business Sales* and *MOWG Study #5*: *Program Diversity and the Program Selection Process on Broadcast Network Television* to determine that advertisers do not consider radio stations, newspapers, and television stations to be good substitutes for each other (Brown & Williams; 2002; Einstein, 2002). Although both MOWG studies were based on national data, not local, for the purposes of examining the radio advertising market, the FCC concluded that radio should be considered to be a separate market from other local advertising media. This finding was also consistent with previous rulings made by the DOJ (see *United States v. Clear Channel Communications*, Civil Action No.: 1:00CV02063, 2001).

The FCC considered the radio listening market to be the most important component of its analysis because of the impact it had on consumers (FCC, 2003i). The FCC also decided that the radio listening market should be separate from other local media markets because again the Commission found that there are no good substitutes for radio listeners in nonaudio media. In response to comments that suggested that this category should include other audio media such as Internet streaming stations and satellite radio, the Commission rejected that reasoning saying that not all radio listeners had access to the Internet and that the combined total of satellite radio listeners was only 600,000 nationally. Additionally, they reasoned that radio is the least expensive and most portable medium available, so it should be considered a category unto itself. The Commission likewise concluded that the radio production market was also unique and that in order to preserve competition, they would consider the radio production market separately as well.

The Commission decided that the old definition of a market was inconsistent with industry standards, so they adopted Arbitron's methodology of counting radio stations within a geographic area rather than by using the signal contour overlap methodology that the FCC had previously relied on (FCC, 2003i). According to the Report, this change conformed to antitrust regulations and protected markets from being overwhelmed by stations whose signals reached farther than smaller stations. Although the Commission conceded that geographic markets might be less accurate than its previous methodology, they argued that radio stations serve people, not land. Consequently, they reasoned that when there is an accepted commercial definition of markets, the FCC should use it. The new rule stated that if an Arbitron market changed, a station owner must wait 2 years before the FCC would consider altering its status. This afforded protection for markets that were expanding or shrinking. Another reason why the Commission decided to adopt the Arbitron standard was because the agency relied on BIA's Media Access Pro-Database software, and that program used Arbitron data.

In its analysis of the numerical limits on local radio station ownership, the FCC concluded that if the current standard met the §202(h) test, because the three-tiered approach to regulating local markets, if amended to include noncommercial stations, guaranteed that there would be at least five relatively equal competitors in each market. Furthermore, since the barriers to entry in local markets were high, given that virtually all spectrum space is licensed, radio broadcasting is a closed entry market. This, according to the Report and Order, effectively limits the market power of station owners.

However, the Commission went on to say that they realized that not all stations are equal in terms of their technical capabilities, and therefore some radio stations groups could reach much larger audiences than others. The Report cited *MOWG Study #11: Radio Industry Review 2002; Trends in Ownership, Format and Finance,* that found that the top 50 metro markets have an average of 19.9 radio station owners and the next 50 metros have an average of 11.4 owners. The remaining metros have an average of 6.7 owners (Williams & Roberts, 2002). While the top 50 metros had an average of 19.9 owners, the top station group in those markets received on average 35.2% of the revenue, and the top four groups receive 86.1% combined. The top four groups also dominated audience share. The Future of Music Coalition, and Bear Stern presented similar findings in their own studies (DiCola & Thomson, 2002; Miller, Ensley, &Young, 2003). This, said the FCC, showed that the numerical limits on local radio station ownership were not particularly onerous. Despite the fact that the rule allowed one station group to own up to half the radio stations in small markets, the FCC considered this to be acceptable because it protected the financial viability of stations in small markets.

The Commission also concluded that localism is protected by the current limitations because local stations are responsive to the needs of their community of license. The FCC asserted that concerns about large station groups are really concerns over national ownership levels, not localism. Therefore, they need not address the issue when deciding whether to retain local radio ownership. When discussing viewpoint diversity, the Commission said that media other than radio can play an important role in the dissemination of local news and information. However, the Commission conceded that viewpoint diversity is important in local radio markets because it is easier to reach specific demographic audiences with radio than with other forms of mass media. Because radio is more affordable than other media, radio remains a likely avenue for new entry into the media business, particularly for women, small business owners, and minorities. This conclusion was reached despite the Commission's earlier assertion that radio remains a closed entry market.

When addressing claims from organizations that argued that program diversity should be the predominant goal for the agency, it said that a recent study by Berry and Waldfogel (2001) showed that reductions in the numbers of owners in a radio market led to an increase in formats. However, *MOWG Study #11* showed that since the passage of the Telecommunications Act, the number of formats across radio markets remained flat. The Commission ascribed the discrepancies between the two studies to the use of different databases. Nonetheless, the Commission said no definitive evidence suggested a causal link between increased concentration in radio markets and a decrease in the number of formats offered in a market.

Cross-Media Limits

The Commission's 2002 Biennial Review Report devoted pages and pages of analysis to support its view that it was not necessary to retain its ban on Newspaper/Broadcast and Radio/Television Cross-Ownership rules pursuant to §202(h) of the Telecommunications Act (FCC, 2003i). The Commission boldly declared that neither the current nationwide ban on newspapers and broadcast outlets in the same market nor the cross service restrictions on the ownership of Television/Radio combinations promoted competition. The Report stated that the 27-year-old ban was intended to promote competition, but the ends sought no longer justified the means used to attain that goal. Therefore, the agency determined that modifying the rules to include a single set of cross-media limits would be more precise and afford greater protection for media owner's First Amendment rights.

The FCC's rationale for this decision began with a review of the rules it was modifying (FCC, 2003i). According to the FCC, the current ban on Newspaper/Broadcast Cross-Ownership allowed no such combinations in markets where a broadcast station's signal contour overlapped with a newspaper's city of publication. One of the flaws of this rule, according to the Report, was that while the regulation was intended to promote media competition and to protect diversity, it did not take into account the size of a market, the number of media outlets, the number of newspapers, nor the number of other media interests that serve each individual market. Hence, the Commission found that the rules did not promote localism either.

In reaching this conclusion, the Commission first defined the relevant geographic and product markets for each medium. Since the primary economic market that each medium competes in is the advertising market, it was the primary focus of the analysis. The Commission expressed its concern that broadcasters could not compete for advertising dollars if they were not permitted to achieve greater economic efficiencies through mergers. If broadcasters could not compete for advertising dollars with other media, free over-the-air broadcasting might not remain viable in the future. Since *MOWG Study #10: On the Substitutability of Local Newspaper, Radio, and Television Advertising in Local Business Sales* established that most advertisers do not ordinarily substitute television, radio, or newspaper spots for each other, the Commission declared that each medium should be a distinct market (Bush, 2002). In other words, radio did not compete for advertising dollars with other media; it competed for those dollars among other radio stations in the market. The concept of each medium constituting a separate advertising market was buttressed by DOJ/FTC merger guidelines that focused on distinct media markets. Therefore, the

Commission reasoned that when one firm acquires another different type of medium in the same market, it is not a horizontal merger and cannot adversely affect competition in another discrete product market.

There were 21 existing cross-ownership arrangements before the Commission passed the Newspaper/Broadcast Cross-Ownership Rule in 1978 (FCC, 2003i). These combinations were granted waivers that were grandfathered into the rule. The FCC examined the markets that contained grandfathered combinations and determined that advertising rates were consistent with those in smaller markets that did not contain any cross-owned properties. In fact, the Commission asserted that some of the grandfathered markets were more competitive than others because of the synergies and cost reductions that the combinations were able to obtain. While the FCC received comments suggesting that some firms with existing cross-owned properties promoted cross media buys, the Commission stated that it was not charged with protecting advertising markets to begin with. Although it was not the FCC's responsibility to police advertising markets, advertisers were not without remedy. Both the DOJ and the FTC addressed these problems, as did federal and state statues. Furthermore, the agency acknowledged that if some advertisers were harmed by the relaxation of the ban, the harm would be greatest only if one entity owned all of the newspapers and all of the broadcasting properties in a market. Moreover, since the FCC retained some constraints on local television and local radio stations, they expected that a healthy level of competition would remain in place.

The FCC explained that newspapers and television stations promoted two entirely different products. Broadcasters provide breaking news and live reports, whereas newspapers can offer more involvement for readers and can cover stories in depth. In their judgment, a firm that accrues newspaper/broadcast combinations cannot affect competition in any relevant market.

The Report then went on to address localism and cross-owned media (FCC, 2003i). The FCC said that the record indicated that the Newspaper/Television Cross-Ownership ban was not necessary to promote local news and public affairs programming. In fact, the Commission found that the ban actually inhibited localism by forbidding owners to capitalize on economic efficiencies obtained through mergers with other media in a market. The Report and Order cited *MOWG Study #7*: *The Measurement of Local Television News and Public Affairs Programs* that suggested a direct correlation between combinations and the amount of local news they provided and that such combinations were more successful in providing quality reporting than other single medium (Spavins et al., 2002). This finding also cited a paper submitted by the Project in Excellence in Journalism, *Does Ownership Matter in Local Television News?* that concluded that combined ownership outlets were more than twice as likely to receive accolades than others were (2003).

The FCC addressed comments by those who asserted that some producers carry a noticeable editorial viewpoint across their properties, and the FCC insisted that this was hardly an indictment against those owners. According to the FCC, certain ideas gain traction in the marketplace of ideas, and it is not up to the agency to intervene. “Nor is it troubling that media properties may allow their news and editorial positions to be driven by ‘the bottom-line’” (FCC, 2003i, p.142). The Commissioners proceeded to explain that the need and desire to produce revenue and profit from media is a time-honored tradition.

Additionally, the FCC determined that a blanket ban on cross-ownership in all communities, under all conditions, could not be sustained in the present media climate.

Since there had been tremendous growth in the number, breadth, and scope of entertainment and information media over the past 27 years, the ban no longer made sense in light of new competition from other media. Besides, enormous benefits could be accrued if companies were encouraged to achieve the efficiencies and synergies that would permit them to enhance the quality and viability of their products. The FCC cited evidence that the average grandfathered newspaper/television combination led their markets in early day-parts and delivered 43% more audience share than the second ranked station in the market (FCC, 2003i; Miller et al. 2003). This study also found that grandfathered combinations created new information outlets on the Internet and over cable.

When addressing diversity, the FCC made the claim that the ban on cross-owned newspapers and television station may actually be harming it (FCC, 2003i). According to this line of reasoning, the synergies and efficiencies that a cross-owned property might be able to achieve could actually lead to increases in the number of newspapers and television stations in a market. Since newspapers and television stations have suffered from declines in reader and viewership in recent years, relaxing the ban would have a positive effect on diversity. Additionally, the FCC must fashion its rules based on the strength of media outlets because maximizing the number of independent voices does not further diversity if the market cannot support multiple outlets.

Quoting from data collected by Pritchard (2002) in *MOWG Study #2: Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign*, the Commission said that there is evidence to believe that individual outlets in group-owned properties do not speak with a monolithic voice. While ownership does undoubtedly influence viewpoint to some degree, there is only anecdotal evidence to suggest widespread bias. The Report stated that the FCC would have to have a high degree of confidence that a uniform bias existed in cross-owned properties to consider this a factor in its rule-making. In fact, the FCC said it had evidence that indicated that competing outlets abound in all markets. For example, television, radio, both commercial and noncommercial, and cable and nationally distributed satellite programming, have all expanded to provide original programming. Additionally, *MOWG Study #3: Consumer Substitution Among Media*, showed that 72% of U.S. citizens are now online and say that they generally consider the Internet as a news substitute for television and newspapers (Waldfogel, 2002).

Likewise, the FCC dispatched the Radio/Television Cross-Ownership Rule. As with the Newspaper/Television Cross-Ownership ban, the FCC rationalized that radio and television comprise two discreet markets, and, therefore, they cannot compete with each other. The Commission agreed that fostering the diversity of voices is a worthy goal; however they did not believe this rule accomplished that end. Instead, they decided to adopt cross-media limits that relied on a diversity index to measure the number of voices in a market.

Diversity Index and Market Concentration

After reiterating the necessity of relying on empirical evidence so the courts would uphold its rules, the FCC announced that it had created a mathematical formula based on the HHI used by the DOJ to determine if a given market for a product was overly concentrated (FCC, 2003i). The HHI created a numerical score that measured market concentration. A market's HHI score is the sum of a market share squared. The higher the number, the more concentrated the market. For example, a market with 10 equal size competitors has a score of 1000; a market with 5 equal size competitors receives a score of 2000 (Cooper, 2003; *Prometheus Radio Group v. FCC*, 2004). The FCC rationalized this approach because it said that they did not expect every outlet to be diverse since the local news product is delivered via multiple media. Accordingly, the relevant issue was whether a consumer in each market had a range of choices. While admitting that the DI was not perfect because it was based on aggregated national data rather than information that was gathered locally, the Commissioners said that the new index would provide them with a baseline summary that would be used to determine which areas are at risk of losing viewpoint diversity.

The data used to construct the index were based on *MOWG Study #8: Consumer Survey on Media Usage*, a study that purported to measure consumers' use of media when seeking out local news and information (Nielsen, 2002). Based on this study, the FCC concluded that the relevant outlets that needed to be included in the DI were radio, television, daily and weekly newspapers, and the Internet. According to *MOWG Study #8*, the aforementioned media were the ones that consumers relied on most heavily to access local news.

The next step taken to determine the DI was to calculate an ownership share of each medium (FCC, 2003i). The FCC chose sample markets, counted the number of outlets in each one, and then assigned them an equal market share. Next, each ownership share was given a relative weight by media type. Consequently, broadcast television received a 33.8% weight, radio was assigned 24.9%, daily newspapers received 20.2 %, weeklies, 8.6%, and the Internet weighed in at 10.2%. However, in markets with cross-owned shares, the entity's weighted ownership score was summed before it was squared. The Commission then squared all of the weighted ownership shares, and their sum equaled the market's total DI share.

After calculating the DI, the Commission then turned its attention to how these scores would change depending on the size of each market. In markets with five or more television stations, the average DI was 911.[5] If a newspaper and television combination existed in that same market, the score increased to 1134. The Commission considered other hypotheticals for combinations in similar size markets. They calculated the DI based on the following scenarios: (a) If one television station and all the radio stations that were allowed to be commonly owned under the local radio rule were owned by a single entity; (b) if one newspaper and all of the radio stations allowed under local radio ownership rule were owned by a single entity; (c) if one newspaper, one television station, and half of the radio stations that were allowed were owned by a single entity; (d) if two television stations were owned by a single entity; (e) if one newspaper and two television stations were owned by a single entity; and (f) if one newspaper, two television stations, and all of the radio stations were owned by one entity. After concluding that all of the above consolidation scenarios would lead to unacceptable increases in the DI score for the smaller markets, the FCC prohibited newspaper/television and newspaper/radio combinations in those markets. In midsize markets with between four and eight television stations, the only unacceptable combinations were those that involved a newspaper and television duopoly, so all others were permitted. In large size markets with nine or more television stations, the Commission did not impose any limits on cross-media ownership.

[5] The DOJ considers a market to be moderately concentrated with a score of 1800.

Summary

Despite considerable input from individuals, public service organizations, and media professionals who urged the Commission to retain the current media ownership regulations, the FCC voted 3-2 to relax or eliminate most of them. The overriding rationale for these decisions was that due to increasing media delivery options, the Commission had a responsibility to protect competition between all types of media outlets, not just within discrete segments of radio, television, and newspaper markets. Powell, Abernathy, and Martin believed that the marginal limits they adopted would increase competition among all media outlets by allowing mergers between media group owners who could then assume increased efficiencies of scale. The majority felt that media owners would then pass on their savings to consumers in the form of improved and expanded products that would benefit consumers and increase diversity. If the theoretical foundations of their determinations were correct, then consumers could look forward to a wider array of viewpoint diversity even if the notion of outlet diversity was largely discarded.

However, the 2002 Biennial Report and Order was littered with inconsistencies and flawed assumptions. A considerable amount of the content of the report was devoted to detailing the FCC's policy goals. According to the agency, diversity, competition, localism, and regulatory certainty were the primary objectives that informed the decision-making process. Although this may have been the case, many of the modifications to media ownership rules were clearly designed to protect the economic interests of the industry it governed.

The National Cap on ownership was increased to 45% of the national audience from 35%, so that the networks would be in a better position to compete with new video delivery channels. The FCC decided that viewpoint diversity is not relevant to national markets, because diversity is only applicable to local markets. Yet, when the decision was made to loosen local television ownership restrictions, the agency decided that it was a flawed assumption to presume that only local television contributed to diversity. Accordingly, the FCC concluded that cable contributed to diversity in local markets, this despite the fact that most of the programming that is distributed by cable systems is produced for a national market. Then, almost as an aside, Report and Order stated that the local television ownership rules were established to promote economic efficiencies, not localism.

According to the Commission, radio is a closed entry market. The Commission also determined that there are no viable substitutes for radio; therefore it did not consider other media when assessing the diversity of local radio markets. Although the Commission reached the conclusion that a closed entry market provides a check on the market power of group owned properties, it still insisted that radio offered an excellent opportunity for new entrants in the market, particularly small business owners, women, and minorities. When addressing whether or not local radio stations provide local news and information to their communities of license, the FCC declared that licensees are responsive to the needs of the community, this, despite assertions to the contrary that the public made repeatedly.

When the Commission decided to increase the limits for cross-owned media, it decided to count all media in determining whether a market is sufficiently competitive, diverse, and local. The FCC then devised the Diversity Index, based on national data, to apply to local markets. The index assigned somewhat arbitrary weights to each medium in order to come up with a mathematical formula that could be applied consistently to each market. However, this resulted in irrational assessments that gave equal weights to weekly shoppers and large metropolitan dailies; college radio stations were accorded the same weight as 50,000 watt clear channels stations, and stations broadcasting community athletic events were given the same weight as were network-affiliated stations.

Although the Commission took pains to establish that its ultimate goal was to provide a media environment that supported localism, competition, and diversity, its decision to achieve this end by allowing group owners to achieve economic efficiencies in local and national markets was immediately contested. The industry was disappointed that more ownership restrictions were not lifted. According to the FCC's own studies, a majority of the population still relied on broadcast television and newspapers for most of their local, regional, and national news. The perception among a significant portion of the public was that fewer owners meant fewer voices would be able to access the marketplace of ideas. In the days and weeks following the release of the Report and Order, the Commission was called to task for their decisions by Congress, the courts, and by the public and by the media.

CHAPTER 11

REGULATORY REVERSAL

Shortly before the Commission voted on the 2002 Biennial Review Order (the Order) in June 2003, more than 150 members of Congress from both parties asked the FCC to postpone the vote until they conducted more studies (Labaton, 2003a). Two days after the FCC voted to relax its media ownership rules, the Senate Commerce Committee summoned the Commissioners to a hearing to explain the rationale for their votes ("FCC Oversight," 2003; Ho, 2003c). Subsequently, throughout the summer, Congress instigated a series of complicated maneuvers intended to reverse or modify the Commission's decision to raise the cap on national television ownership (Ahrens, 2003b; Crabtree, 2003a; Davidson, 2003f). As soon as the Order was published in the *Federal Record*, activists filed lawsuits challenging the new rules in several jurisdictions. The cases were consolidated, and the lawsuit proceeded on to the U.S Court of Appeals for the Third Circuit Court in Philadelphia. Meanwhile the public asserted its opposition to the new rules by writing editorials, by writing letters and e-mails, and by phoning the FCC and their representatives in Congress (Blevins & Brown, 2006; McChesney, 2004a). In September, the court issued a stay prohibiting the FCC from implementing the new regulations pending review (*Prometheus Radio Project v. FCC*, 2004). On June 24, 2004, the court issued its opinion that much of the FCC's reasoning in the Order was arbitrary and capricious and remanded it back to the agency. Six months later, Powell submitted a letter of resignation to President Bush (Powell, 2005).

Heated Reactions

Before the Commission voted in June, many trade publications and major newspapers predicted that no matter what the FCC decided, no one would be completely satisfied with the outcome (Ahrens, 2003a; Davidson, 2003d; Hearn, 2003a). The pundits were correct. Even Powell told the *New York Times* that lawsuits were inevitable (Labaton, 2003a). Criticism came from all stakeholders in the debate. Presidential candidate John Kerry and his running mate John Edwards condemned the FCC's vote (Dreazen, 2003a; Labaton, 2003b). In fact, all of the Democratic presidential candidates expressed their opposition to the new rules. The *Wall Street Journal* reported that Democratic opposition to the vote was part of a larger strategy to depict the Bush administration as being too close to business interests and too lax in moderating corporate excess. According to Mark Mellman, a Democratic pollster and strategist, the FCC vote was part of a pattern of the Bush administration caring more about the interests of big business than about ordinary citizens. Mellman predicted that Democratic candidates would exploit the consolidation vote as part of a larger agenda. Kerry announced that he would introduce a Resolution of Disapproval[6] in the Senate to reverse the new regulations (Anselmo, 2003a; Johnson, 2003). Edwards said that he would co-sponsor a bill already introduced by Senators Ernest Hollings and Ted Stevens that would reinstate the 35% national cap on ownership (S. 1046, 2003). Edwards said the vote to relax the

[6] A resolution of disapproval allowed a simple majority to override an administrative agency ruling.

cap was a "massive giveaway of public resources to a few privileged insiders," and it was "bad for free expression, bad for American democracy, and particularly bad for the forgotten corners of rural America" (Dreazen, 2003a, p. A4).

House Democratic leader Nancy Pelosi issued a press release stating that she was very disappointed in the FCC's ruling (Pelosi, 2003). She accused the Republican majority of recklessly loosening rules that were put in place to serve the public interest. House Democratic Caucus Committee Chairman Bob Menendez issued his own statement saying that the FCC's vote showed no regard for the public's opposition to deregulation in media. He accused the press of ignoring the issue even after a dozen House members organized a press conference to discuss their opposition to the proposed rules before the vote.

> Not a single network camera, radio or mainstream print outlet showed [up], we were faced with the grim reality of what a future with further consolidation may look like. When media conglomerates lobby for change, but refuse to air debate, then corporate decision-making has infiltrated the newsroom. (Menendez, 2003, p.1)

Senators Trent Lott-R, Earnest Hollings-D, and Bryon Dorgan-D called a news conference to criticize the Commission (Dreazen, 2003a; Labaton, 2003c). They declared that opposition to the FCC's decision was not a partisan issue. However Billy Tauzin-R, chair of the House Energy and Commerce Committee, applauded the FCC, although he said the FCC should have gone even further to deregulate broadcasting.

Mark Mays, president and chief operating officer of Clear Channel Communications, issued a statement saying that his company was deeply disappointed with the Commission's vote to "re-regulate" radio ("Clear Channel Criticizes," 2003). Mays claimed that before the passage of the Telecommunications Act of 1996, nearly

60% of the radio industry was operating in the red. Before the act, radio stations were cutting news budgets and laying off staff, but after the legislation, radio station owners began to innovate and find new ways to serve their listeners and grow their businesses. Mays said that the FCC Order suggested that the agency had succumbed to political pressure at the expense of the public interest when it revised market contours that failed to lift ownership caps in radio completely. Although Mays insisted that Clear Channel would continue to strive to provide the best entertainment, local news, and information for its listeners, he implied that the Commission's vote would seriously hamper his company's efforts.

Trade publications reported that Congress seemed unlikely to roll back the new rules despite the outcry from senators, because Senator McCain and Representative Tauzin controlled key Congressional committees and both were opposed to any rewrites of the rules (Crabtree, 2003a; Halonen, 2003c; McConnell, 2003b). However, most observers agreed that the Federal Appeals Court in Washington, DC would be deluged with lawsuits as soon as the FCC had time to review petitions asking it to reconsider the rules. *Broadcasting & Cable* reported that Clear Channel was expected to challenge the radio ownership rules, and small stations and affiliates were expected to sue over the new 45% cap on national ownership. Consumer groups were likely to exploit inconsistencies in the ruling in court. Despite predictions that no bill to reversing the FCC rules would make it through Congress, the growing backlash against the agency was of concern to media lobbyists (McConnell, 2003b; Shields, 2003c). John Sturm, president and chief operating officer of the Newspaper Association of America, said that his organization would work diligently to prevent any erosion of new rules.

Senate Confrontation

Just 2 days after the FCC voted to relax its media ownership rules, Senator McCain, chair of the Commerce, Science, and Transportation Committee, asked the Commissioners to justify their votes to the full committee (FCC Oversight, 2003; Ho, 2003c). Powell began his testimony by reminding the senators that the FCC did not always have the luxury of abiding by public opinion (Powell, 2003b). He said the Commission was bound to comply with the rules laid down by Congress and the courts, whether its regulations were popular or not. He repeatedly said that the rule changes were moderate and twice pointed out that any single network owned less than 3% of the nation's television stations. He denied that he was promoting gratuitous deregulation, and stressed that the FCC was compelled to continue the process of deregulation that began with the 1996 Telecommunications Act. Powell insisted that the modifications to the ownership rules were carefully considered so that they would meet the agency's public interest goals of diversity, localism, and competition. He said that when the FCC considered the "explosion" of new media outlets, it was striking a careful balance between the public interest and corporations' ability to compete in the marketplace.

In a prepared statement, Commissioner Abernathy supported Powell and suggested that Congress should consider increasing the time allotted for regulatory review (Abernathy, 2003). She pointed out that the Commission was already 5 months behind schedule and that it was difficult to adhere to a 2-year schedule of review. Abernathy reiterated Powell's argument that the courts had struck down every broadcast ownership rule that they had appraised since the Telecommunications Act. She said that if the agency had kept its past rules intact, the court would have vacated them. Abernathy also claimed that the Commission had a duty to protect the First Amendment rights of broadcasters, and therefore, it had to tailor its rules to conform to the competitive realities of the current marketplace. In reply to allegations that the FCC rushed to judgment on the new rules, Abernathy told the committee that the FCC had initiated a review of the Newspaper/Broadcast Cross-Ownership Rule in 2001. Other studies of the rules were initiated in 1996 and 1998. Therefore, the FCC had between 18 months and 7 years to study these issues. She repeated Powell's claim that the defining characteristic of the 2002 Biennial Review Order was balance. Abernathy told the senators that it should go without saying that none of the Commissioners wanted to see media concentrated in the hands of few but that reasonable minds differ on where the lines should be drawn.

Commissioner Copps began his statement to the committee with an expression of dissent from the majority.

> I strongly dissented to this decision. I dissented on grounds of substance. I dissented on grounds of process. I dissented because I believe the Commission's actions empower America's new Media Elite with unacceptable levels of influence over the ideas and information upon which our society and our democracy so heavily depend. (2003c, p. 1)

Copps (2003c) told the senators that he believed that the Commission came to a fork in the road. One path led to a reaffirmation of America's commitment to local control of media, diversity, and the importance of competition. The other path, according to Copps, led to a handful of corporate giants controlling media content. He said that the FCC should have looked to the law before deciding which path to take. The Telecommunications Act of 1996, according to Copps, indicated that Congress felt it was necessary to put limits on how many media outlets an entity could control. The Supreme Court ruled on numerous occasions that it is the right of citizens to receive a diverse array of voices, rather than to tolerate the monopolization of the marketplace of ideas. When the radio industry became unforeseeably consolidated after limits on ownership were lifted, the FCC should have used that experience to guide its decisions about other segments of the broadcast industry. Finally, Copps said that the FCC should have listened to the American people when the agency received close to three quarters of a million comments from citizens who were 99.9% opposed to lifting ownership restrictions. Copps said that the FCC's decision to allow radical deregulation would allow media giants to exert a massive influence over communities: "I see centralization, not localism; I see uniformity, not diversity; I see monopoly and oligopoly, not competition" (p. 3). Then Copps elaborated on his earlier remark that the decision-making process was flawed. He told the committee that the process was dominated by a classic inside-the-beltway mentality. Instead of keeping the proceeding transparent and reaching out to the public and other interested parties, the Commission refused to disclose the new rules before voting on them. After offering a lengthy critique of the majority's rationale for liberalizing the rules, he ended his statement by reading the senators a note that he had received:

> Dear Commissioner: I understand you're messing around with the people's airwaves. I don't think I like what you're doing. I know I don't like the way you're doing it. I'm a citizen and I expect to be told what your plans are before you do it. Get a grip. Straighten out your priorities. Thank you. (Copps, 2003c, p. 8)

When it was his turn to speak, Commissioner Martin began by thanking the senators for giving him an opportunity to answer any questions they might have (Martin, 2003c). He praised the hard work and vision of Chairman Powell and said he was grateful to Commissioners Copps and Adelstein for their tireless effort to reach out to the public.[7] After a long explanation of the difficulties involved in assessing the issues, Martin quoted from §202(h) of the Telecommunications Act and reminded the committee that the FCC has a legal mandate to determine whether the rules are still necessary in today's marketplace. Martin said that the DC Circuit Court had placed a demanding burden on the Commission to repeal or modify the ownership rules. He quoted from *Fox v. FCC* (2002) saying that the Commission may retain a rule only if it reasonably determines that the rule is necessary in the public interest. In Martin's opinion, the new rules were necessary. He then went on to talk about the abundance of media available in today's marketplace and the importance of protecting localism, diversity, and competition in the face of changed circumstances.

Commissioner Adelstein (2003c) began his statement by noting that June 2 had been a sad day for democracy. He predicted that media companies would go on buying sprees and would therefore accumulate debt and become even more beholden to bottom line issues than they already were. He foresaw a media environment that contained more sensationalism, more crassness, more violence, and less coverage for serious news and local events. He derided the assumption that allowing more cross-ownership in media holdings would increase levels of public interest programming. Adelstein informed the Committee that a national study found that combined television coverage of all political campaigns in 2000 was about 74 seconds per night. This figure included all time spent covering all election campaigns, local, statewide, and national. It excluded political advertising. He concluded his statement by acknowledging that the courts and Congress required the FCC to review the media ownership rules every 2 years. However, he was

[7] The only field hearing Martin attended was the one held in Richmond, Virginia.

of the opinion that the agency should have required a market-by-market, case-by-case approach that would ensure that each merger served the public interest.

After the Commissioners spoke, the Committee members peppered them with questions and criticism (Davidson, 2003e; FCC Oversight, 2003; Ho, 2003c; Labaton, 2003c). Powell twice defended the new rules as “modest proposals”; however the Senators were not very sympathetic to his claim. Although Chairman McCain was widely acknowledged to be in favor of deregulation, he noted that the business of media ownership was too important to be dealt with categorically. He told the Commission that he would insert language into an upcoming bill to clarify that the FCC had the authority to strengthen ownership rules as well as to loosen them (S. 1046, 2003). McCain also said that the Committee would consider extending the period between compulsorily reviews. Senator Hollings, who had already introduced a bill cosponsored by Senator Stevens to rescind the National Television Ownership Rule, was an even harsher critic. Hollings, the Committee’s ranking Democrat, said Powell was engaged in spin and fraud. Hollings accused the agency of becoming an instrument of corporate greed. Senator Kay Bailey Hutchinson said that lifting the Television/Newspaper Cross-Ownership Rule was an alarming development. Senator Olympia Snowe said that the new regulations paved the way for further consolidation and concentration into the hands of a few. She noted that the court declared that the FCC had to have a rational basis for determining what is in the public interest. She doubted that the FCC could determine the public interest without involving the public (Kirkland & Stuck, 2003; Shields, 2003c). Senator Barbara Boxer told the Commissioners that it was their job to represent the people, not special interests. Senator Byron Dorgan said he would introduce a bill to reinstate the

Television/Newspaper Cross-Ownership Rule. Senator George Allen disagreed with the other committee members and said that the new rules reflected the current marketplace. As the meeting ended, McCain scheduled a vote on S. 1046 that would reverse the FCC's 2002 Biennial Review Order and rescind the National Television Ownership Rule (Anselmo, 2003; *Preservation of Localism*, 2003; S. Rprt. No. 108-141, 2003). Nine Senators from the Committee cosponsored the bill, including four Republicans.

Committee Consensus

On June 19, the Senate Commerce, Science, and Transportation Committee forwarded S. 1046 out of committee (Ahrens, 2003b; Geewax, 2003; S. 2046, 2003; S. Rpt. No. 108-141, 2003). The bill contained provisions that would roll back the National Television Ownership Rule to the previous limit of 35% and force television group owners to divest of some of their stations if they were over the line. The bill had bipartisan support and passed with a voice vote. According to Hollings, the vote was a repudiation of the FCC's disastrous ruling. The bill permitted radio station owners who were already over the limit to keep all of their existing stations, and it would have allowed state regulators to recommend waivers to the amendment if it was necessary to keep a station from going off the air. Additionally, the bill required the FCC to hold at least five public hearings before contemplating any future ownership changes. Also language in the bill clarified the FCC's authority to strengthen, as well as to relax, media ownership rules.

Although this was a partial victory for those who were opposed to the FCC's June 2 action, there was considerable doubt over whether the bill would be successful when it came time for the full Senate to vote (Ahrens, 2003b; Anselmo, 2003b; Geewax, 2003;

"Media-Rule Thrill Ride," 2003; Shales, 2003). Although there were similar bills making their way through the House of Representatives, Representative Billy Tauzin vowed to block the bills from reaching the floor of the House. Additionally, C.W. Bill Young, a Republican Representative from Florida who chaired the Appropriations Committee, said he would strongly resist any attempt to attach a rider overturning the FCC vote as apart as a larger spending bill. However, Representative John Dingle, a Democrat from Michigan, was the ranking member of the House Energy and Commerce Committee and he strongly supported a bill to amend the FCC rules. Moreover, most observers gave the bill slim to no chance of passing in the Senate. Nonetheless, both of the Democratic members of the FCC were encouraged by the Commerce Committee's vote. Copps declared that they had momentum on their side and that the decision would awake a sleeping giant. Adelstein said that the other Commissioners should see the writing on the wall and reverse their ruling.

The Sleeping Giant Awakes

While Congress was considering its options, lobbyists from all sides of the issue descended on both Houses (Chester, 2007; Klinenberg, 2007; McChesney, 2004a). A wide range of public activist groups such as CU, CFA, FreePress, MoveOn.org, the Parent's Television Council, the Christian Coalition, NOW, and labor unions pressed Congress to block the new rules from taking effect. Not only did these groups lobby Congress, but they also created extensive web sites to inform the public about media consolidation. There were letter-writing campaigns, petition drives, and urgent e-mails asking citizens to call their representatives. On a single afternoon, House members logged over 40,000 telephone calls about media ownership. Their constituents' opposition to the new rules overwhelmed members of Congress when they traveled back to their districts. Additionally, the National Association of Broadcasters, with 1,100 independently owned television stations and 6,000 radio station members, initially supported the roll back on the national cap.

On the other side of the debate, the networks were urging Congress to let the FCC's vote on the National Television Ownership Rule stand (Schatz, 2003). However, when the Senate Commerce, Science, and Transportation Committee passed Senate Bill 1046, which included provisions to retain cross-ownership limits and the National Television Ownership Rule, NAB withdrew its support for the measure due to pressure from its other members (Anselmo, 2003b). The National Association of Newspapers, The Tribune Company, Hearst/Argyle, and the Belo Corporation stepped up their own lobbying efforts and urged the committee to drop the cross-ownership amendments to the bill.

Meanwhile, from June through November, both chambers of Congress were introducing bills, blocking bills, passing resolutions, and generally trying to respond to increased pressure from the public. By the end of July, the FCC received an additional 1.25 million letters opposing the new rules (Anselmo, 2003d). In May, Richard Burr-R of the House Committee on Energy and Commerce had introduced a bill called the Preservation of Localism, Diversity in Programming, and Competition in Broadcast Service Act of 2003 (H.R. 2052, 2003). The bill would have reinstated the 35% National Television Ownership limit, but Tauzin refused to let it out of committee, this despite the fact that the bill had 192 co-sponsors, including 147 Democrats and 45 Republicans (H.R. 2052, 2003). Since this strategy was not effective, after much maneuvering, the House

Appropriations Committee attached a rider to a funding bill for the Commerce, Justice, and State departments (H.R. 2799, 2003). It passed out of committee by a vote of 40-25. However, by the time the bill reached the full floor, it was amended so its provisions would only be in effect for 1 year. The vote passed by a margin of 400-12. Subsequently, the White House announced that President Bush would veto the bill, and the President even appeared on Fox Television with Powell telling the audience what a good job Powell had done with the new rules.

This development left the senate to consider its own version of a similar bill (Davidson, 2003f; “FCC Media Ownership,” 2003). On September 4, the Senate Appropriations Committee amended an omnibus-spending bill that would have effectively blocked media ownership changes indefinitely. The bill contained many other controversial provisions and did not pass. On September 16, the full Senate passed a Resolution of Disapproval by a vote of 55-40. The resolution condemned the FCC’s Order and would have reversed the new rules if it passed in the House. However, the prospects for that appeared unlikely (Crabtree, 2003b; Mundy, 2003b). By this point, both the Senate and the House were scrambling to find some consensus so that any version of a bill would pass. Tauzin was still trying to block any legislation from reaching the floor in the House. Then, on November 5, members of the House sent Majority Leader Dennis Hastert a letter imploring him to let the full House consider its own Resolution of Disapproval. On November 24, in a last minute deal, the White House and Senate Republicans reached a compromise that would limit national ownership to 39%. That compromise drew the line precisely at the limit that would allow Viacom and the News Corporation to retain all of their stations. A rider was attached to an omnibus spending bill in the House, and it passed on December 8. It was ratified in the Senate on January 23, 2004 (Consolidated Appropriations Act, H.R. 2673, §629, 2004). The rider also contained a provision that gave group owners 2 years to divest of some of their holdings if they were over the limit and changed the biennial review requirement of the Telecommunication Act to a quadrennial review. President Bush did not veto the bill and it became law. While all of this maneuvering was taking place in Congress, activists were not standing still; they sought a remedy from the courts and filed petitions in several jurisdictions to reverse the Order.

Prometheus Radio Project and the Media Access Project

On August 13, Andrew Schwartzman of MAP, in conjunction with the Prometheus Radio Project, the Media Alliance, and the National Council of Churches of Christ (Citizen Petitioners) filed suit against the FCC in three different jurisdictions (*Prometheus Radio Project v. FCC*, 2004). The petitioners argued that the deregulatory provisions contained in the 2002 Biennial Review Order did not conform to the FCC's statutory mandates, and that the rulemaking process violated the Administrative Procedures Act. Although the DC Circuit Court was usually the venue for appeals to FCC decisions, it was also widely acknowledged to be in favor of deregulatory decisions (McConnell, 2003b; Yang, 2003). Schwartzman's strategy of filing suit in three different venues was precluded on the assumption that all three appeals would be consolidated and moved to a more favorable circuit (Bischoff, 2003; "Ownership Re," 2003; "The Politics," 2003). However, NASA, representing affiliates of NBC, CBS, and Capitol Broadcasting, filed suit in Washington, DC arguing that the National Television Ownership limit should be retained at 35%. A long list of other media companies

(Network Petitioners) also appealed the decision, although those companies thought the new rules were too restrictive. Fox Entertainment Group and the Sinclair Broadcast Group filed a petition in Wahington, DC to overturn the National Television Ownership Limit altogether. After the Judicial Panel on Multijurisdictional Litigation reviewed all of the petitions, it did indeed consolidate the three Prometheus petitions and the other challenges into one case. The Third District Court in Philadelphia was chosen to hear the case after a lottery was held. Then the Network Petitioners filed a motion to transfer the case back to the DC Circuit.

Prometheus et al. subsequently filed a counter motion (*Prometheus Radio Project v. FCC*, 2004). First, they argued that the Network Petitioner's motion asserting that the DC Court was the only appropriate venue for hearing the case was invalid. The Network Petitioners then declared that the *Prometheus v. FCC* (2004) case was closely related to *Fox Television Stations v. FCC* (2002) and *Sinclair Broadcast Group v. FCC* (2002). Therefore, the DC Court had the necessary expertise to decide the case. In answer to the question of expertise, the Citizen Petitioners responded by saying that if Congress wanted to give the DC Circuit additional jurisdiction over the FCC rulemaking process, it would have done so. Additionally, the Citizen Petitioners contended that the *Fox* case stemmed from the 1998 Biennial Review, not the 2002 Order that was currently under scrutiny. The *Sinclair* (2002) case had its roots in an FCC rule that was adopted in 1999, but not completed until 2001. According to the Citizen Petitioners, this distinguished the cases from the preceding at hand. The Network Petitioners also accused MAP of forum shopping and questioned the legitimacy of the Prometheus Radio Project's standing in the case.[8] The Network Petitioners also argued that it would be inconvenient for their attorneys to travel to Philadelphia from Washington, DC. Then, the Citizen Petitioners countered by pointing out that Philadelphia was only an hour and a half commute by train, probably less than the commute the attorneys made from their homes to their offices.

On the same day the court ruled on the motion to transfer, the Citizen Petitioners filed a motion asking the court in Philadelphia to issue a stay that would prevent the FCC's rules from taking effect before the case could be decided (*Prometheus Radio Project v. FCC*, 2004). Prometheus argued that there was a significant possibility that the Senate might overturn all or parts of the 2002 Order. Accordingly, not only did these circumstances increase the likelihood that Prometheus might succeed in the litigation, but it also magnified the likelihood that the Prometheus would incur irreparable harm absent a stay. The precedent that defined the criteria for issuing a stay was *Virginia Petroleum Jobbers Ass'n v. FPC* (1958). The test for an issuance of a stay asks four questions. Has the petitioner made a strong showing that it is likely to prevail on merits of the appeal? Has the petitioner shown that there will be irreparable harm to the petitioner in the absence of a stay? In the absence of a stay, will others be harmed? Where lies the public interest?

On September 3, after hearing 4 hours of oral arguments from Prometheus Radio Project and the FCC, Fox Entertainment Group, Fox Television Stations, NBC, Telemundo, and Viacom, the Court granted the Prometheus Radio Project's request for a

[8] As noted in proceeding chapters, citizens have legal standing in matters before the FCC, and the Prometheus Radio Project had a long history of being involved with issues related to media reform (Caruso, 2003; Lazaroff, 2003; *Office of Communication of the United Church of Christ v. FCC*, 1969).

stay (Dreazen, 2003b; *Prometheus Radio Project v. FCC*, 2004). The Per Curium opinion applied *Virginia Petroleum Jobbers Ass'n v. FPC* (1958) and determined that there was a considerable risk of harm to the Citizen Petitioners if the rules were permitted to take effect. Those harms, including the possibility of more mergers occurring before the Court could decide the case, were considerable. In contrast, the court could see no harm likely to be incurred by the Network Petitioners if the status quo was maintained until the case was decided.

> While it is difficult to predict the likelihood of success on the merits at this stage of the proceedings, these harms could outweigh the effect of a stay. Given the magnitude of this matter and the public's interest in reaching the proper resolution, a stay is warranted pending thorough and efficient judicial review. (*Prometheus v. FCC,* 2003, Stay Order, p.3)

The reaction to the court-ordered stay was swift and furious. The FCC said in a statement that it will "continue to vigorously defend them [the new rules] and looks forward to a decision by the Court on the merits " (Dreazen, 2003b, p. A3). MAP issued a statement that was cautiously optimistic and thanked all who had collaborated with them. The press release also acknowledged that this was hardly the end of the fight MAP, 2003). Gene Kimmelman told the *Washington Post* that "this is a surprise to everybody, nobody expected we'd get a stay" (Ahrens, 2003c, p. 3A).

Others in the industry expressed surprise as well. One trade journal began its report on the decision with this lead; “ If Michael Powell is wearing a neck-brace to work this week, everyone will know the cause of his injury: political whiplash” (Hearn, 2003c, p. 3). Levin, an analyst for Legg Mason, told reporters that the rules were on hold anyway until Congress finished its review, but the stay increased the level of uncertainty. He also said that he thought that once the case was moved back to Washington, DC the court would lift the stay (Mundy, 2003b). Therefore, during that 1 week in September, Chairman Powell suffered two serious setbacks to his broad agenda to deregulate media. One day after the court issued its stay, the Senate Appropriations Committee approved a spending bill that would roll back the national cap on television ownership to 39% (Consolidated Appropriations Act, H.R. 2673, 2004). Laura Behrens, a media analyst at Gartner/G2, said that Powell miscalculated a sea change in public opinion. It was her impression that Congress wanted to keep the current rules intact. One week later, Powell and the networks were dealt another blow.

Philly Court Retains the Case

On September 15, the Third Circuit Court of Appeals in Philadelphia denied the Network Petitioners' joint motion to transfer the case to Washington, DC (*Prometheus Radio Project v. FCC,* 2004). The court concluded that the issues in *Prometheus* (2004) were not closely related enough to warrant transfer to the DC Circuit. The judges said that the 2002 Order was an omnibus biennial review of media ownership rules compelled by the Telecommunications Act of 1996, not by *Fox* and *Sinclair* (*Prometheus Radio Project v. FCC*, 2003). The justices also asserted that the Third Circuit Court was no less qualified than any other appellate court to determine whether the FCC appropriately considered the public interest in its decision-making process. Levin declared that this was a significant setback for the networks. *Broadcasting & Cable* reported that keeping the case out of Washington, DC did not necessarily ensure a favorable deregulation decision (Hearn, 2003b; McConnell, 2003b). No matter what happened in Congress, no mergers could go forward until the Court reached its decision. Even though the court issued an expedited schedule for the case, a decision was not expected until the following spring. Schwartzman insisted that it was highly speculative to think that his strategy to keep the case out of Washington, DC would pay off in the end. Others predicted that the case would inevitably end up in Washington one way or another, through appeals to the Supreme Court, through remands to the FCC, or through new legislation working its way through Congress. The networks did not issue any comment immediately after the denial to transfer the case.

In September, Powell gave a telephone interview to the *New York Times* (Labaton, 2003e). He told the reporter that he was thinking about retiring from his post but had not reached any firm conclusion about whether he would stay, and if so, for how long. The author described him as being “alternately frustrated, assertive and resigned” as he acknowledged the political skills of his opponents (Labaton, p. C1). Powell said that he had been misrepresented by his adversaries and said that there had been a political lopsidedness about the debate over media ownership. He said that the people opposed to him were part of a highly vocal community: “On the other side, if you are in a fraternity watching TV and drinking beer and happy, what are you going to do about the debate? You are not [going to do anything]. I think the public is more upset with the media than they are with the rules” (Labaton, p. C1).

The problem with Powell’s reasoning was that most citizens did not belong to a fraternity, and many, over a million, *were* upset about the rules. Powell had badly miscalculated the political nature of his job as he had tried to stay above the fray. Powell acknowledged that as a matter of principle, he deliberately avoided doing any political groundwork before advancing the new rules. Powell said he thought of his role as more like a judge than a politician, as though he could ignore the political realities of life on the beltway. By mid-September, he had lost a number of his senior advisors including his chief of staff Kevin Ferree. Some ex-FCC employees said that they left because Powell ignored their political advice and never gave them authority to strike potential deals that could have avoided some of the FCC's subsequent problems.

While Powell brooded about his future, the court in Philadelphia accepted motions and proceeded with its the case. The Network Petitioners requested that the Court sit en banc and rehear its motion to move the case back to Washington, DC. The Court denied this motion on October 1. After the first of the year, the court issued an Oral Argument Order. The arguments were scheduled for February 11 and the Citizen Petitioners[9] and the Deregulation Petitioners[10] were both allotted 45 minutes for their arguments (*Prometheus Radio Project*, 2004). The FCC was given 90 minutes to make its case, and the MMTC[11] group had 15 minutes before the Court.

After President Bush signed the Consolidated Appropriations Act that rolled back

[9] The Citizen Petitioners included the following parties: Prometheus Radio Project, Media Alliance, National Council of Churches of Christ in the United States, Fairness and Accuracy in Reporting, Center for Digital Democracy, Consumers Union and Consumer Federation of America, Capital Broadcasting Corp., and Network Affiliated Station Alliance.

[10] The Deregulatory Petitioners included the following parties: Fox Entertainment Group, Inc., Fox Television Stations Inc., National Broadcasting Company Inc., Telemundo Communications Group Inc., and Viacom Inc., Paxson Communications Corp., Univision Communications Inc, Tribune Company, and Media General Inc.

[11] The MMTC group included the following parties: The American Hispanic Owned Radio Association, Civil Rights Forum on Communications Policy, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, Minority Media and Telecommunications Council, National Asian American Telecommunications Association, National Association of Latino Independent Producers, National Coalition of Hispanic Organizations, National Council of La Raza, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Urban League, Native American Public Telecommunications, Inc., PRLDEF-Institute for Puerto Rican Policy, UNITY: Journalists of Color, Inc., and Women's Institute for Freedom of the Press.

the National Television Station Ownership Limit to 39%, the Philadelphia court asked the petitioners to comment on the legislation in the form of a letter brief ("Office of the Clerk," 2004). The citizen petitioners filed a brief that conceded that the Consolidated Appropriations Act might make the appeal of the national cap moot (Consolidated Appropriations Act, H.R. 2673, 2004; *Prometheus Radio Project v. FCC*, 2004; Schwartzman, Leanza, Campbell, Bachtell, & Henein, 2004). However, they also argued that the Consolidated Appropriations Act did not address the issue of whether the UHF discount of 50% was appropriate. Additionally, they argued that the definition of national audience reach in the statute was unclear because it relied on the UHF discount and proprietary information from Nielsen's DMA's. Capital Broadcasting Company Inc. submitted a letter brief addressing the same issues. They asserted that the legislation did not mention the UHF discount at all, and, therefore, it was still subject to review based on whether or not the rule was arbitrary and capricious. NASA argued that the issue of the National Television Ownership Rule was moot but suggested that the Court hold the matter in abeyance pending further orders from the Congress.

The Network Petitioners also claimed that the issue was moot in light of the new legislation. They argued that Congress knew that audience reach was calculated including the UHF discount. Therefore, the networks argued that the issue was moot or should be held under abeyance. Paxson Communications/Univision contended that the issue of the legitimacy of the UHF discount was not under the court's jurisdiction because neither the Citizen Petitioners nor the interveners mentioned it in their opening briefs. Therefore, they too insisted that the issue was moot. The FCC told the court that it was now obligated by statute to raise the National Television Ownership Limit to 39%

and suggested that it was not necessary to hear oral arguments on the issue.

Oral Arguments

On February 11, the court heard oral arguments in *Prometheus Radio Project v. FCC* (2004) before Chief Justice Anthony Scirica and Justices Julio Fuentes and Thomas Ambro. Although the oral arguments were set to last for 4 hours, the hearing actually lasted over more than 8 hours (Labaton, 2004; McConnell, 2004a). The citizen petitioners[12] were given 2 1/2 hours to make their presentations and answer questions from the panel (*Prometheus Radio Project v. FCC*, 2004). The main thrust of Prometheus' argument was that the FCC had made competition a higher priority than diversity, which was misguided. More specifically, the citizen petitioners argued that the FCC failed to consider lowering the UHF discount. Although the FCC claimed that no one from the public argued against the discount, Schwartzman was able to prove otherwise. The Citizen Petitioners also disagreed with the FCC's interpretation of §202(h) of the Telecommunications Act, and said that there was nothing in the language that forced the agency to deregulate ownership rules. The presumption that this section of the Telecommunication Act of 1996 required the agency to deregulate was a false assumption. "What the FCC has done is place the burden on the proponents of the rule to demonstrate why a rule is necessary," Schwartzman said. "This is not a correct reading of the law, and in fact demonstrates that the Commission has had its thumb on the regulatory scale" (Lazaroff, 2004, p.3).

[12] Andrew Schwartzman, CEO and President of MAP; Angela Campbell, of Georgetown's Institute of Public Representation, on behalf of Media Alliance; and Glenn Manishin, of the law firm Kelley, Drye & Warren, on behalf of Consumer Federation of America; and Consumers' Union, represented the Citizen Petitioners.

Additionally, the Citizen Petitioners claimed that the theoretical structure that rationalized the new rules was erroneous and therefore led to a flawed analysis (*Prometheus Radio Project v. FCC*, 2004). They gave an example from the FCC Diversity Index that concluded that the Duchess County Community College television station was 50% more valuable in terms of audience reach than was the *New York Times*. The Duchess County station was also weighed equally with the ABC affiliate station in New York City. Moreover, the citizen petitioners said it was completely without foundation to give equal weight to the Internet as a source of significant original local news. Furthermore, the FCC also counted television stations that did not offer local news in the Diversity Index, which was inconsistent with its own stated goal of preserving localism.

Richard Wiley, the ex-FCC chairman who represented the Newspaper Association of America and three other broadcasters, argued that the court should question the relevancy of *Red Lion* (1969), the Supreme Court case that upheld the Spectrum Scarcity Doctrine and ruled that the public interest in broadcasting was paramount to a broadcaster's First Amendment rights (*Prometheus Radio Project v. FCC*, 2004). Wiley also questioned the authority of *NCCB v. FCC* (1969), the case that upheld the constitutional validity of the FCC's ban on owning a television station and a newspaper in the same market. He said that those rules no longer made any sense in the current media environment (Labaton, 2004; " MAP Report," 2004). Miguel A. Estrada, a lawyer representing Clear Channel and the networks, argued that § 202(h) required the Commission either to set aside older restrictions or to deregulate them over time. Estrada told the judges that the FCC was correct to rule that diversity—assuring a variety of programming—should be regarded as secondary to competition when determining how many radio stations any one corporation can own in a market. Estrada also argued that when the FCC cannot decide between diversity and competition, ties should go in favor of deregulation.

John Rogovin, chief counsel for the FCC, defended the Commission's efforts, saying they reflected a well-thought-out balance between the financial interests of media companies, which favor consolidation, and the public good of having newspapers and broadcast companies compete with each other for viewers, readers, and listeners (Labaton, 2004). Judge Ambro asked the attorneys for the FCC to explain why the DI produced inconsistencies such as the Duchess Country Community College’s television station rating being higher than the *New York Times* on the scale. "I understand you tried to draw lines, but in some cases, what is not allowed turns out to be better than what is allowed," Judge Ambro said to Jacob Lewis, a Commission lawyer (Labaton, p. C1). Lewis tried to diminish the significance of the DI, saying that it was only one of a number of tools used in market analysis. “The Commission should not be faulted for trying to impose greater analytical rigor rather than simply waving their hands" (Labaton, C14). Ambro asked the FCC attorneys how they justified the UHF discount in light of satellite and cable permits that allow formerly fuzzy stations to be seen clearly. The Consumers Federation of America contended that the FCC’s analysis artificially raised the diversity number up to a point that justified the Commissioner’s preconceived notions. Schwartzman also argued that the polling data gathered by Nielsen asked the wrong questions and was thus unreliable. The subsequent discussion seemed to indicate that the justices were concerned with the accuracy of the index. Ambro also questioned why the Diversity Index was based on hypothetical examples instead of real-world market data.

The panel questioned Estrada about his assertion that one broadcaster could provide as much diversity as several and quoted from a brief submitted by the United Church of Christ that reported that even through the number of radio stations had increased, the number of station owners had declined. The justices also questioned Estrada's claim that the Telecommunications Act of 1996 required the FCC to deregulate rules and gradually phase all of them out entirely and that the act limited the FCC authority to impose tougher regulations on his clients.

By the time the hearing ended, it was clear that the court was concerned about the validity of the Diversity Index, but they gave little indication of how they would ultimately vote. While the trade journals speculated, activists continued to pressure for reform, and the industry was stuck in a holding pattern.

The Court's Opinion

Prometheus Radio Project v. FCC (2004) was decided by a three-to-one vote, with Judge Anthony Scirica dissenting. Justice Ambro wrote the majority opinion that extended the temporary stay of the FCC's new ownership rules pending further review. The court affirmed that the Commission had the Constitutional authority to regulate media ownership and rejected Deregulatory Petitioners' claim that §202(h) provided rigid limits on how the FCC could interpret the public interest. Specifically, the court ruled that the Commission did not sufficiently justify its numerical limits for local television ownership, local radio ownership, and cross-ownership of media within local markets.

Justice Scirica dissented from the majority because he did not believe that the court should be substituting its own policy judgments for that of the Commission (*Prometheus Radio Project v. FCC*, 2004). He acknowledged that the agency's reasoning was not perfect; however, he wanted to give the FCC some leeway until the next review so they could rectify any mistakes over time without having to resort to a court remand. Ambrose and Fuentes responded to his objections by noting them and explaining that they had no policy views except to ensure that the Commission act with reason. In a footnote to the opinion, the majority clarified their position with this statement, "The bottom line: the Commission gets another chance to justify its actions. Once that occurs, and the case returns to us, we may yet close the loop of agreement with our colleague" (*Prometheus Radio Project, v. FCC*, 2004, p.15).

The decision in this case was lengthy, and the justices' reasoning was detailed (*Prometheus Radio Project v. FCC*, 2004). It began with a general review of the issues and the arguments filed by the principal parties and the interveners.[13] First, the court addressed the Citizen Petitioners' claim that the deregulatory position of the FCC disregarded the statutory mandates of the Telecommunication Act of 1996 and certain provisions of the Administrative Procedures Act (Public L. No 104-104, 1946). The court accepted the agency's stated goal that it was in the public interest to protect competition, localism, and diversity. However, it ruled that the public record did not support specific aspects of the Order and thus was not rational. It rejected the

[13] The Citizen Petitioners included the aforementioned parties along with The Office of Communication of the United Church of Christ as an intervener. The Deregulatory Petitioners included the afore mentioned parties joined by Clear Channel Communications Inc.; Emmis Communications Corporation; Sinclair Broadcast Group; and interveners Belo Corporation; Gannett Corporation; Morris Communications Company; Milkcreek Broadcasting LLC; and Nassau Broadcasting Holdings.

Deregulatory Petitioners' claim that the Order violated the U.S. Constitution and ruled that the words "repeal or modify" in §202(h) did not mean that the FCC's only option was to repeal the rules. Rather, the Commission had to be able to justify its decisions according to reasoned analysis. The court then addressed each rule individually.

Due to the legislation passed by Congress in January restricting the National Television Ownership Limit to 39% of the national audience reach, the court decided that the challenge to the cap was moot. The FCC agreed in a letter brief that it would abide by statutory mandates from Congress. According to the court, the issue of the 50% UHF discount was also moot. The discount had been in effect since 1985, and the jurists assumed that legislators understood that the definition of the national audience reach included the allowance. The court did not agree with the Citizen Petitioners' argument that the UHF discount was mistakenly included in the bill.

Next, the court turned its attention to the cross-ownership rules and restated the record (*Prometheus Radio Project v. FCC*, 2004). The Commission determined that the rule prohibiting Newspaper/Broadcast Cross-Ownership was no longer necessary in the public interest for three reasons. First, the ban was no longer necessary to promote competition because advertisers did not view newspapers and television to be good substitutes for each other. Second, the Commission claimed that the ban harmed localism by prohibiting firms in the same market from creating economic efficiencies through mergers. Third, there was not enough evidence to conclude that common ownership influences viewpoint diversity.

In order to support the claim that the Newspaper/Broadcast Cross-Ownership ban harmed localism, the FCC relied primarily on *MOWG Study # 7: The Measurement of*

Local Television News and Public Affairs Programs (Spavins et al., 2002). This study, however flawed, showed that existing cross-owned properties carried 50% more local news and information than other television stations in a market. The FCC asserted that those same stations were the most highly rated in a market and that cross-owned stations garnered more awards than others did. The court agreed that consumer and critical approval indicated that there was evidence that cross-owned stations can promote localism and that a complete ban on these mergers was not necessary.

However, the citizen petitioners argued that *MOWG Study #7* was inaccurate because it measured all markets, including those with cross-owned local properties within a market, together with those controlled by distant corporations. The Citizen Petitioners also claimed that the FCC relied on anecdotal evidence to draw their conclusions. Nonetheless, the Court found this aspect of the FCC's argument to be persuasive and explained that the Commission had only used anecdotal evidence to illustrate one of its points. On the issue of whether the FCC's point that there was not enough evidence to determine if commonly owned properties speak with one monolithic voice, the citizen petitioners were highly critical of *MOWG Study #3: Consumer Substitutability Among Media* (Waldfogel, 2003). While the court noted the methodological problems of the study, it acknowledged that sources other than broadcasting do contribute to viewpoint diversity, but only to a limited extent. The court found that the FCC weighed cable television and the Internet too heavily in its determination of cross-media limits.

The deregulatory petitioners argued for the repeal of the Newspaper/Broadcast Cross-Ownership Rule in its entirety and said that they would not accept any limits at all because any restrictions would violate newspaper owners' and broadcasters' First and

Fifth Amendment rights. They also asked the court to reconsider the spectrum scarcity rationale, saying that it was no longer relevant in the current media environment. The court disagreed on all counts, and it decided that limits on cross-ownership were not only Constitutional, but retaining some limits on cross-ownership was necessary to protect the public interest. Besides, the court did not have the power to overturn the Supreme Court's decision in *Turner v. FCC* (1994), the case that had most recently upheld the spectrum scarcity principle. Pointing out that physical spectrum space was no less limited because there are supplemental ways of delivering information, the court declined to accept this argument.

Instead, the court applied the rational basis standard from *NCCB v. FCC* (1978), saying that limiting common ownership is a reasonable way of promoting the public interest in mass media. In *NCCB v. FCC*, (1978) the court ruled that cross-ownership restrictions do not violate the First Amendment. The judges agreed with the conclusion of the Commission that a ban is necessary in some instances; nevertheless, the court decided that the Commission had not provided reasoned analysis to support the Cross-Media Limits that it chose.

According to the FCC, it chose to construct its limits as narrowly as possible so it could avoid needless overregulation of markets with ample viewpoint diversity (*Prometheus Radio Project v. FCC*, 2004). Consequently, it focused on identifying markets that were at risk for becoming overconcentrated. That being said, the court found that the FCC's Cross-Media Limits employed several irrational assumptions and inconsistencies. The biggest problem was with the DI. The justices did not have an issue with using the DOJ's HHI as a starting point; the difficulty came when the FCC tried to connect it to local markets and when they weighed the Internet too heavily on the scale. Additionally, according to the court, the FCC irrationally assigned outlets of the same media type equal market shares, and, therefore, inconsistently derived its Cross-Media Limits from the Index.

The Citizen Petitioners argued that when the FCC decided to include the Internet as a local media source when measuring the diversity of a market, it gave too much weight to the Internet at the expense of discounting the importance of daily newspapers and local television stations (*Prometheus Radio Project v. FCC*, 2004). On the other hand, the Deregulatory Petitioners claimed that the FCC understated diversity of viewpoint when it did not include cable television as a source of local news. The court ruled that the decision to discount cable television while including the Internet was irrational.

The judges explained that the FCC's decision to discount cable television was sound because cable was not usually a source of original local content (*Prometheus Radio Project v. FCC*, 2004). The Commission chose to ignore the section in MOWG Study #8 that asked respondents where they get their local news because there were indications that people were confused about the question (Nielsen, 2002). It appeared that respondents were watching their local stations delivered by cable and, therefore, said that they accessed local news on cable. The survey's accuracy on this question was also doubtful because Nielsen had provided data that showed that locally originated cable channels, when available, were the least watched stations overall.

The Commission included the Internet in its calculations because *MOWG Study #8* suggested that people reported that the Internet is a significant source of local news, but the survey failed to identify any websites (Nielsen, 2002; *Prometheus Radio Project v. FCC*, 2004). The court pointed out that there is a crucial difference between websites that offer independent sources of local news, and those that are merely republishing news from local television and newspapers. According to the court, aggregator websites are not independent voices and should not have been counted as such. Additionally, the FCC cited *The Drudge Report* and *Salon.com* as examples of websites that added to the diversity of viewpoints, but those sites are directed toward national audiences, not local ones. Contrary to the Commission's claim that there is a vast universe of information available on the Internet, the court said that the Commission should have distinguished between local independent websites and national ones. The judges also explained "the media" functions, at least in part, to deliver local news and public affairs programming. Search engines that deliver content such as local restaurant or concert venues have a different function. Likewise, many websites function as aggregators or distillers of information, but they are not "media outlets" (*Prometheus v. FCC*, 2004, p. 65). Neither are local government websites or commercially driven sites. The judges reasoned that if the Commission included those types of sources as media outlets, then they would have to include telephone books too. The court was also skeptical of the FCC's claim that the Internet is available everywhere, when data provided to the Court that 30% of the U.S. population did not have access to Internet connections. The judges said that this argument was irrelevant anyway. On remand, the court suggested that the agency either exclude the Internet or find a better rationale for including it in light of their decision not to include cable television in its calculations.

Next, the court ruled that the Commission did not justify its assumption that all outlets in a media type received the same market shares as all other media outlets in the category *(Prometheus Radio Project v. FCC*, 2004). This assumption was inconsistent with the overall approach to the DI taken by the FCC and made unrealistic assumptions about a media outlet's relative contribution to viewpoint diversity in a market. It was also inconsistent with the decision to assign relative weights to different types of media themselves. The Order made a point of saying that there is no reason to believe that all media are of equal importance. However, the fact that the Commission chose to assign media outlets of the same type equal weight negated the proffered rationale for using the HHI to account for losses of viewpoint diversity through mergers. Furthermore, the Commission assigned equal market shares to outlets that did not provide local news.

> Additionally, there is no dispute that the assignment of equal market shares generates absurd results.... A Diversity Index that requires us to accept that a community college television station makes a greater contribution to viewpoint diversity than a conglomerate that includes the third-largest newspaper in America also requires us to abandon both logic and reality. (*Prometheus v. FCC*, 2004, p. 68)

The justices then questioned why the FCC did not use actual market data to assign market shares, especially given that it used such data to assign weights to general media types. The court said simply that the FCC needed to undergird its predictive judgments with evidence in order to survive arbitrary and capricious review. The FCC claimed that if they used market data to assign market shares, they would have to evaluate content. According to the Commission, making judgments about content would violate the First Amendment and create other legal obstacles. The court specifically rejected those claims. Pointing out that the FCC had risen above such challenges when it commissioned the MOWG Study #8, by simply asking people where they got their news, the agency's claim to collection of data problems were vague and unexplained. Moreover, the reason for eschewing actual use data was unrealistic and inconsistent with the FCC's overall approach to the DI.

The court also said that the agency should provide better notice on remand. The opinion noted that the remand offered the agency an opportunity to cure its questionable notice of the DI and explained that the FCC was also obligated to provide notice of its underlying methodology and the reasoning from which it derived its proposed rules. The court found that the FCC's decision not to release this information was not without prejudice, especially given the numerous flaws represented in the DI.

Local Television Triopoly Rule

In its Order, the FCC decided to allow triopolies in television markets with 18 or more stations, and to allow duopolies in markets with 17 or fewer stations if the merger was not with one of the four top-rated stations in a market (FCC, 2003i). The court upheld the Commission's determination that mergers between the four top-rated stations were inadvisable but remanded the FCC's numerical limits so the Commissioners could rectify its inconsistencies and better support its assumptions (*Prometheus Radio Project v. FCC*, 2004). In contrast to the deregulatory petitioners' claim that limiting the number of commonly owned television stations in a market was duplicative of the DOJ's antitrust guidelines, the justices said that the two guidelines aim to achieve different means. The antitrust guidelines are designed to protect market prices, whereas the FCC's goal is to protect the public interest. When the Commission argued that media other than broadcast television could contribute to viewpoint diversity, the court did not disagree entirely. However, this claim by the FCC was a departure from its position in *Sinclair v. FCC*

(2002). The justices remanded this rule because the Commission did not adequately demonstrate that there was ample substitutability from other broadcast media. The court rejected the citizen petitioners' argument that the research used to determine if commonly owned stations provided more quality news broadcasts was flawed, saying that the studies were supported by evidence. Contrary to the citizen petitioners' claim that the FCC had not properly noticed its intention to allow triopolies in certain markets, the court ruled that the agency had provided adequate notice. Citing the FCC's announcement that it would be addressing the Local Television Ownership Rule and that it would take under consideration the remand from *Sinclair v. FCC* (2002) in its 2002 Biennial Review was sufficient notice according to the court.

When rejecting the FCC's numerical limits on local television station ownership, the court took exception to the FCC's construction of the DI and its equal market share approach. The FCC asserted that there were too many fluctuations in television station ratings to provide reasonable data. The court countered that the agency used an actual market share approach when it decided to ban mergers among the 4 top-rated stations in a market. The judges concluded that the agency had not provided evidence that supported its claim that television rating varied so drastically that they could not be used as a source of reliable evidence. Thus, the court ruled that the numerical limits assigned by the agency were inconsistent and patently unreasonable. Even though the court affirmed that the FCC had the authority to modify its rules and methods, it considered the limits it chose to be arbitrary and capricious.

<u>Local Radio Ownership Rule</u>

The court took issue with the FCC's rationale for retaining its existing numerical limits on radio station ownership, although it did say that the Commissioners had provided justification for counting noncommercial stations in a market (*Prometheus Radio Project v. FCC*, 2004). The court also conceded that the FCC was well within it rights to alter its methodology so it could measure markets geographically instead of by overlapping signal contours. However, the Commission's assumption that there needed to be five equal-sized competitors in a market for it to remain competitive lacked a reasoned analysis of why they chose this particular benchmark.

The Commission used game theory to support its five equal-sized competitors in a market standard (see Brenahan & Reiss, 1991; Phlips, 1995). However, according to the court, the Commissioners did not show how existing numerical limits ensured five equal-sized competitors. There was no evidence that a market with five equal-sized competitors existed or had the potential to exist. In fact, they said that it defied logic to assume that a combination of a top-ranked station is a competitive equal to a combination of low-ranked stations just because both entities own the same number of stations. Again, the court questioned why the FCC did not consider actual market share when deriving its numerical limits. The citizen petitioners argued that the five equal-sized competitors approach contradicted the DOJ and FTC's Merger Guidelines that determined that a market with five equal-sized competitors is highly concentrated. The court agreed that this was an unacceptable contradiction in the FCC's methodology, and the court ruled that the FCC's evidence was suspect, not rationally derived, and was not applicable to real-life market conditions.

Summary

If Chairman Powell had not fully absorbed the political reality that the stakeholders in the FCC policy-making process were fully committed to advancing their competing values before the Commission voted to relax media ownership rules in June, this actuality must have inundated his consciousness in the months following the decision. The clash between those who elevated the social values embedded in communications policy over the market considerations of the broadcast industry peaked during the year that followed. Powell's neglect of the political ramifications of the Commission's decisions was a costly miscalculation.

Public opposition to the relaxation of media ownership rules not only failed to subside after the FCC completed the 2002 Biennial Review, but public antipathy toward the Commission's decisions intensified. As the media increased its coverage of the issue, citizens expressed their objections to the new rules with increased vigor, putting pressure on Congress to abate the most egregious measures contained in the Order. Despite the many objections by powerful Republicans to passing any proposals modifying the new regulations, Congress eventually succumbed to political demands and attached a rider to an omnibus spending bill that lowered the national television ownership limit to 39%.

Although Powell repeatedly vowed that the Commission would create a defensible record of empirical evidence to support its determinations, the theory and execution of its rationale for adopting the DI were illogical and incongruous. Media activists were able to exploit the contradictions contained in the Order to convince the court that the potential harm to citizen petitioners was substantial enough to issue a stay of the Order in pending further review. After hearing 8 hours of oral arguments in

Prometheus Radio Project v. FCC (2004), the court rendered its opinion in June. The majority stated that the FCC's assumptions when creating the DI were irrational and inconsistent. The Administrative Procedures Act made it illegal for a federal agency to promulgate regulations that were arbitrary and capricious; therefore the court remanded the modified local television, local radio, and local cross-owned media rules back to the FCC for further consideration. Powell's FCC had elevated the competitive economic analysis of markets over the social values that were embedded in U.S. communications policy, and the Court rejected his definition of the public interest in broadcasting.

The FCC declined to appeal the court's decision, and Powell submitted his resignation shortly thereafter. President Bush nominated Kevin J. Martin to replace Powell. Martin, Bush's former campaign advisor and chad counter in Florida, was confirmed by Congress in 2005. Martin was widely acknowledged to be politically astute.

CHAPTER 12

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

This critical study has been an examination of the policy-making process during a time when shifting conceptions of the functions and purpose of broadcasting were widely contested. After Congress passed the Telecommunications Act of 1996, the legal regime that was grounded on a foundation of public service idealism evolved to one based on market forces pragmatism. The contest over these competing regulatory goals came to a head during FCC Chairman Michael Powell's attempt to loosen restrictions on media ownership policy during his tenure. This chapter summarizes and evaluates the empirical evidence documented in previous chapters and offers conclusions based on those findings. Additionally, this chapter answers the research questions that guided this study and offers recommendations for future inquiry.

Summary

This narrative began by situating the communications policy environment in 2001-2004 against the historical background of broadcast regulations. Chapter 2 traced the origins of the public service requirements of broadcasters back to the earlier practice of permitting private corporations "affected with the public interest" to monopolize public right of ways in exchange pledging to help construct the nation's transportation infrastructure (Colten, 1993; Horowitz, 1989: *Munn v. Illinois*, 1876). This chapter also demonstrated how initial attempts to regulate the transportation and communications infrastructures informed the construction of the Radio Act of 1927 and later the Federal Communications Act of 1934. Not only was the FCC responsible for maintaining the integrity of the electromagnetic spectrum, but it was also responsible for promoting the public interest, convenience, or necessity in broadcasting (Radio Act of 1927, §3). As the first three chapters of this dissertation demonstrated, the FCC struggled to define the public service obligations of broadcasters in various ways over several decades. However, the idea that the public interest could be served by promoting localism, diversity, and competition was reoccurring and persistent (Kahn, 1984; *NBC v. U.S.*, 1943; Sterling & Kittross, 1990; *2 FRC Ann. Rep 166*, 1928). In most cases, the courts upheld the constitutionality of the agency's decisions when the FCC limited media ownership in local and national markets, prohibited cross-ownership of media properties, and set policy designed to promote diversity of services by encouraging competition among providers.

Chapters 2 and 3 explored how a deregulatory political climate influenced the FCC's decisions to gradually relax broadcast ownership policies in the 1980s (Aufderheide, 1999; Horowitz, 1989; Keller, 2004). When Congress had the opportunity to revamp the provisions of the Communications Act of 1934, it chose to elevate market considerations over the consideration of public interest obligations of the industry. This section of the dissertation analyzes the debates that lead up to the passage of the Telecommunications Act of 1996, and it considers the political and economic rationale for forwarding this legislation. Furthermore, this section analyzed the changing market conditions after all national ownership limits for radio were lifted. Next, this narrative continues to interrogate the positions of stakeholders in the policy-making process, and it traces the beginnings of a public backlash against media consolidation.

When Congress adopted the mandate that requires the FCC to review its media ownership rules periodically, it set the stage for legal challenges to any remaining media ownership regulations (Telecommunications Act, 1996 §202 h). Indeed, two influential cases heard by the United States Court of Appeals for the DC Circuit were described and analyzed in Chapters 4 and 6. The opinions issued in *Fox v. FCC* (2002) and *Sinclair v. FCC* (2002) propelled Chairman Powell forward in his quest to provide the courts with irrefutable evidence that would support any subsequent changes in media ownership regulations.

As Powell prepared for the 2002 Biennial Review, he convened a panel of public experts to discuss how empirical research could be designed to support the Commission's findings in the upcoming review (FCC, 2001e). While the experts explored how various methodologies could be adapted to measure competition, most agreed that the public interest in media ownership could not be measured exclusively with quantitative methods. Nonetheless, a week later, Powell announced that he was forming a Media Ownership Working Group (MOWG) to study issues related to market performance and media consolidation using economic data (FCC, 2001a). Chapter 7 offers a critique of the studies.

While MOWG was completing its research, public opposition to media consolidation grew. Long established public interest organizations devoted to media issues saw an increase in the number of concerns expressed about media consolidation among their members (Chester 2007; Klinenburg, 2007; McChesney, 2004a). Aided by the Internet and the use of email, these groups began to coordinate their efforts. New organizations were formed to educate the public about media policy, and other groups with broader-based missions were devoting resources to the explorations of media regulations. The last third of this study describes how opposition to further media consolidation grew as the June 2 deadline for the decision approached.

As the regulation of media ownership became a political problem for the FCC, Congress expressed its dissatisfaction with the way the review process was proceeding (Klinenburg, 2006; McChesney; 2004a). They were hearing from many angry constituents who feared that further media consolidation would affect the quality of the democracy in the United States. Several chapters of this dissertation document the arguments for and against further relaxation of the rules that were voiced by stakeholders in the decision-making process. The procedures adopted by the Commission during its review process are also examined, including both official and unsanctioned hearings, testimony to Congress and industry groups, and public appearances by the Commissioners.

Despite the negative input from Congress and the public, the Commission voted on June 2, 2003, to modify, repeal, and revise many of the media ownership restrictions that had been in place for several decades (FCC, 2003i). The majority voted to approve raising the National Television Ownership Rule to 45%, up from 35%, and to maintain its 50% discount on UHF stations. They voted to retain the Dual Television Network Rule. Additionally, the Commission voted to repeal both the Television/Newspaper and Radio/Television Cross-Ownership prohibitions and replaced them with a single set of Cross -Media Limits that were also applied to the Multiple Television Ownership Rule and the Local Radio Ownership Rule. The Third District Court of Appeals issued a stay of the new rules in September 2003 and remanded most of the rules back to the FCC in its final ruling (*Prometheus Radio Project v. FCC*, 2004).

Conclusions

The first goal of this study was to contextualize the communications policy environment 2001-2004, within the historical background of broadcast regulations. Another objective of this study was to analyze the arguments forwarded by citizen groups and to compare and contrast them to the arguments presented by the FCC in order to provide a critical analysis of the FCC's performance from 2001-2004. Consequently, study was guided by the following research questions.

Research Question#1: How did the competing public interest definitions advanced by FCC Commissioners contribute to the formulation of broadcast ownership policy procedures and practices during this period?

FCC Chairman Michael Powell made no secret of his belief that the market should dictate the structure of media ownership policy at the FCC or that he thought deregulation would best serve the public interest (Fallows, 2003; Hickey, 2003a). Commissioners Abernathy and Martin held similar views. In contrast, both Commissioners Copps and Adelstein were equally forthright about their inclination to retain media ownership restrictions so consolidation would not inhibit the marketplace of ideas (FCC, 2002a; Hearn, 2001). However, it would be a mistake to assume that the five Commissioners did not share certain conceptual agreements over the definition of what constitutes the public interest in broadcast ownership policy. There was little debate over whether the Commission's traditional policy objectives should be abolished. The 2002 Biennial Report and Order repeatedly emphasized that any modification of the existing rules could only be accomplished if they continued to promote diversity, competition, and localism.[14] There is no evidence that any members of the Commission disagreed with these core values.

If the Commissioners agreed that promoting diversity, localism, and competition was imperative to the public interest, there was little consensus among them over how these goals should be achieved. Powell believed that a competitive market across the spectrum of telecommunication service providers would result in consumer access to a wide array of sources (FCC, 2003i; Powell, 2000, 2001b, 2002a, 2003d). If he was not overly concerned about competition between discrete categories of media, it was because he believed that the Internet and other content providers would fill in the gap if enough consumers supported them. In Powell's view, the public interest in media ownership was an economic problem. As long as the FCC could structure its rules so that a certain number of firms could be maintained as relatively equal competitors in the market for audio and video delivery services, the dynamics of the market would ensure that localism and diversity would be protected as long as there was a demand for those services. Powell's interpretation of the public interest was evident in the way that he structured many of the policies and procedures that he spearheaded during his tenure.

One of the first procedures that Powell instigated as part of the 2002 Biennial Review was to convene a panel of seven "distinguished experts" to participate in the Media Ownership Roundtable Discussion (FCC, 2001a; FCC, 2001e). Five out of seven

---

[14] In its 2002 Biennial Regulatory Review, the FCC defined five types of diversity: viewpoint, outlet, source, and female and minority ownership. The agency defined localism as a broadcaster's obligation to be responsive to the needs and interests of local communities and it defined competition as the most effective means of producing the marketplace results that best serve the public interest (Report and Order and Notice of Proposed Rulemaking, 2002, p.19).

of the panelists were classically trained economists, and the others had more than a passing acquaintance with using quantifiable methods in their research. All but 1 of the 12 studies produced by the MOWG used research designs dependent on content analysis or market data to evaluate the information that was compiled (FCC, 2002d). When critics questioned the assumptions and research methods employed by the authors of these studies, Powell and his staff created the Diversity Index ("FCC Chairman Backs," 2003). This variation of the Herfindahl-Hirschman Index assigned numerical values to media outlets in each market in order to determine how much concentration in a market could be allowed before it would affect diversity, competition, or localism. Since Powell and the other Republicans Commissioners were looking exclusively for economic data to support their initiatives, they discounted other ways of measuring the success or failure of their rules. They largely ignored the social and political ramifications of the policy-making process (Blevins & Brown, 2006).

On the other hand, Commissioners Copps and Adelstein subscribed to the view that the primary method for assessing whether the Commission's policies were a success was by soliciting public opinion (Adelstein, 2003a; Copps, 2003a: FCC, 2003b). From the beginning of the review process, both Copps and Adelstein invited the public to participate in the policy-making process (McConnell, 2002a, 2002b). Copps urged Powell to release the proprietary data sets that were used in the MOWG studies so academics and other members of the public could study the results. Copps repeatedly requested that the deadline for public comment be extended. When it appeared that Powell was reluctant to hold any public hearings to discuss media ownership policy, Copps badgered Powell until he agreed to hold the Richmond hearing. The format for the hearing allowed little time for the public to question the panelists or express their opinions about the FCC's media ownership policy.

After Powell refused to schedule any additional hearings, Copps and Adelstein sponsored town hall meetings across the country (Fallows, 2003; Klinenberg, 2007; McChesney, 2004a). For the two Democratic Commissioners, public opinion about media ownership was the most important aspect of the process. As the political pressure on Powell grew, he spoke publicly about his wish to avoid political or philosophical debates. When Powell refused to release a draft of the 2002 Report and Order to the public or to Copps and Adelstein, before he was required to do so legally, he further alienated two important stakeholders in the policy-making process: Congress and the public. Therefore, competing definitions of the public interest in broadcasting led to competing attempts to influence the procedures and practices of the Commission.

Research Question#2: How did the Telecommunications Act of 1996 reframe the communications environment?

When legislators abandoned the spectrum scarcity rationale in favor of viewing the electromagnetic spectrum as one element in the telecommunications universe, the regulatory barriers that had kept discrete categories of the industry from competing against each other were dissolved (Aufderheide, 1999; McChesney, 1999; Telecommunications Act, 1996). Telecommunications firms were then permitted to deliver video and audio content that had once been the exclusive terrain of broadcasters. Subsequently, broadcasters argued that competing with other video and audio providers would put them at a competitive disadvantage. Therefore, Congress loosened or eliminated many media ownership restrictions so that broadcasters could consolidate their holdings and achieve economic efficiencies in a multichannel media environment. In exchange for increased spectrum allocations, television broadcasters pledged to convert their analogue signals to digital.

The creators of the Telecommunications Act of 1996 assumed that increased competition across the spectrum of telecommunications providers would lead to more innovation and lower costs to consumers (Aufderheide, 1999; Keller, 2004; Meyerson, 1997). In recasting the public interest as a consumer's right to innovative services at competitive rates, the Telecommunications Act equated a deregulated, completive media environment with public interest in communication policy.

However, the act resulted in less competition among broadcasters and led to a wave of consolidation that was most pronounced in radio. The national cap on radio ownership was lifted entirely (Chester, 2007; Klinenberg, 2007; McChesney, 2004a, 2004b). Two years after the Telecommunications Act passed, almost half of all stations nationwide had changed hands, and the number of individual station owners had dropped precipitately. The act permitted media corporations to own eight radio stations in large markets, and the production of local news on radio declined. Radio programming became standardized and centralized, and the use of voice tracking became prevalent. By 2002, Clear Channel Communications owned more than 1200 stations nationwide, and many of those stations were airing nationally produced content.

The Telecommunication Act also raised The National Television Station Ownership Limit to 35% of the national audience. In the 50 largest markets, a single entity could own more than one television station or a radio and television station or a television station and cable system. Additionally, one entity could own more than one network. Cross-ownership of cable networks and television networks was permitted.

The act also extended the time between license renewals for broadcasters and made it next to impossible for the FCC to render a licensee unfit for failing to serve the public interest. The act also abandoned rate regulations for cable, except for basic service, and encouraged cross-platform competition from other telecommunication providers.

When legislators required the FCC to review the remaining media ownership limits every 2 years, they placed a higher burden of proof on the agency to justify the retention of the rules. Although the language in §202(h) was ambiguous, it created a new opening for challenges to the media ownership limits in court. The provision for biennial reviews of the regulations also placed a higher administrative burden on the FCC.

Question #3: To what extent did the competing interpretations extant during this time period contribute to the specific procedures for generating public response to proposed rulemaking?

As an administrative agency, the FCC is required to comply with the minimum standards for public participation in the decision-making process that are mandated by the Administrative Procedures Act (APA, 1946). According to the APA, the FCC is obligated to publicly disclose information related to the regulatory process, and the FCC must provide opportunities for the public to comment on any proposed regulatory actions. Therefore, many of the specific procedures for generating public response to the proposed rules were legally established and were not affected by competing interpretations of §202(h) of the Telecommunications Act of 1996.[15] The court ruled in *Prometheus Radio Project v. FCC* (2004) that the FCC had complied with most the

[15] The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest (Telecommunications Act of 1996, § 202 h).

noticing requirements of the APA, but it recommended on remand that the Commission provide better notice of its Cross-Media Limits.

However, competing interpretations extant during this time period did contribute to the supplementary procedures for generating public response to the proposed rules. As previously noted, Commissioner Copps repeatedly called for the public involvement in the process (Copps, 2002c, 2002d, 2003a; FCC, 2002a, 2002b). After citizen's responded to his call, the resulting political pressure forced Powell to agree to allow public access to the MOWG data sets, to schedule the Richmond hearing, and to extend the deadline for comments on the Notice of Proposed Rulemaking (FCC, 2002a, 2002c, 2002g, 2003c).

As opposition to any further relaxation of the media ownership rules grew, Powell continued to insist that the regulatory process was not a political issue, and he attempted to ignore calls for more public accountability in the biennial review process (Blevins & Brown, 2006; McChesney, 2004a). He derided what he called the angels of public interest and challenged those who believed in the angels to provide empirical evidence to support their theories (Powell, 1998, 2002a, 2002b). By the time the filing window on the NPRM closed in February, the FCC had received more comments on media ownership than it had on any other issue in its history. Most of them opposed the Commission's proposed changes to the media ownership limits.

When Powell agreed to appear at the Columbia Forum on Media Ownership, his opening statement warned the audience to dispense with emotional declarations and stick to the facts (Powell, 2003c). The ensuing discussion was ardent and passionate with the majority opposed to loosening the rules ("Columbia Media," 2003). However, Powell left the forum shortly after reading his opening statement. A week later, Powell wrote an editorial in *USA Today* condemning those who sought to make media ownership a political issue by substituting personal ideology and opinion for the facts (2003e). Powell underestimated how strongly people felt about the issue, even while he denied the role of politics in the policy-making process. This was not only naïve, but it also came off as arrogant and had the effect of inflaming his opponents (Hickey, 2003b).

After Powell reluctantly agreed to hold the only public hearing on media ownership in Richmond Virginia, he was criticized for scheduling it as close to the beltway as was possible (McConnell, 2002b; "Onward to Richmond," 2002) The panelists were mostly insiders, and there was little time allotted for public comments or questions. Commissioners Copps and Adelstein urged Powell to hold more hearings, but Powell refused, saying that after reviewing over 15,000 comments made in response to the NPRM and after sitting through the hearing, he had heard enough from the public.

After the Richmond hearing, coverage of the issue intensified as the June 2 deadline for the 2002 Report and Order approached ("News Media," 2003; Strong Opposition," 2003). What was once primarily an inside the beltway issue was now becoming a matter of general public interest. The more people heard about the possibility of increased media consolidation, the less they liked it. Commissioners Copps and Adelstein proceeded to organize a serious of unsanctioned public forums across the country, and many of them were attended by standing-room only crowds (Chester, 2007; Klinenberg, 2007; McChesney, 2004a). The FCC and Congress were flooded with letters and phone calls from their constituents who were opposed to relaxing media ownership rules, and public service organizations stepped up their efforts to bring the issue in front of the public. The momentum against the Commission's proposal to modify the rules kept building, yet Powell refused to postpone the decision. He also withheld the draft of the Report and Order from Copps and Adelstein until 3 weeks before the decision.

In the year leading up to the FCC's decision, many members of Congress had been expressing their displeasure with the state of media consolidation and with how Powell was managing the biennial review process (Blevins & Brown, 2006; "Lawmakers Decry," 2003; Lee, 2003; McChesney, 2004a). Members of the Senate and House introduced bills that would repeal some of the FCC's rules, they wrote letters to Powell calling him to task for not giving enough consideration to the public's opposition to further relaxing the rules, and they expressed their concerns that relaxing the rules would be detrimental to a democratic society. Although Powell was surely uncomfortable with their criticism, his intransigence backed him against the wall, and he refused to yield to the legislators' concerns. Although some members of Congress may have interpreted §202(h) of the Telecommunications Act very differently than did Powell, they had little influence on the specific procedures for generating public response that the FCC followed during this time period.

Question #4: To what extent did the range of public comments contribute to subsequent policy-making during these years?

There is little evidence to suggest that the range of public comments that were submitted to the FCC in response to the September 24 Notice of Proposed Rulemaking influenced the decisions made by the Commission's majority when they voted to amend the FCC's media ownership rules on June 2 (Blevins & Brown, 2006; Holman & McGregor, 2001; McGregor, 2006). In fact, Chairman Powell told one reporter that although he was interested in knowing what consumers thought about media ownership, the comments he had seen were too generalized and opinionated. Therefore, he did not accept them as evidence. However, legally the FCC is required to consider all public comments submitted before the filing window closes when making its decisions. Yet, Powell described the letters as “a whole collection of anecdotes that were not responsive to the Court's question” (Mulkern, 2003a, K1).

There are a number of reasons why the Commission might have chosen to ignore public comments (Holman & McGregor, 2001; McGregor, 2006). First, the Republican majority on the Commission was predisposed to favoring its deregulatory agenda. Second, although the FCC stated that it received “more than 500,000 brief comments and form letters from individual citizens, most of which expressed opposition to changing the media ownership rules,” the vast majority of those comments were not received until after the filing window was closed (FCC, 2003i, p.5). Therefore, only a few thousand comments received by individuals were legally eligible for consideration. Additionally, since the Notice of Proposed Rulemaking asked for specific comments based on technical, legal, or economic analysis, many concerned citizens were unable to address the Commission’s criteria for commenting in a way that the Commission found persuasive. Therefore, many of the comments submitted by individual citizens did not offer information about the specific policy questions that were sought by the Commission.

Even though public opinion may not have overtly influenced the Commission’s policy-making prior to the June 2 vote, there is no doubt that Congress did consider the range of public comments it received in opposition to media consolidation (McChesney, 2004a; “The Politics,” 2003). Certainly, the subsequent modification of the National

Television Station Limit by Congress can be attributed to voter opposition to the new rules. Additionally, Congress listened to its constituents before the Notice of Proposed Rulemaking was issued. Senators Hollings, Dorgan, and Inouye introduced a bill in 2001 that would have revoked the FCC's ability to lift media ownership rules ("No Title," 2001). In a January 2003 meeting of the Senate Commerce, Science, and Transportation Committee, the senators warned the Commissioners to proceed very carefully, and they were urged to hold public hearings (Competition Issues in the Telecommunications Industry, 2003). Two weeks later, the same Committee held a hearing to discuss consolidation in the radio industry (Media Ownership, 2003). The senators again were responding to complaints from citizens who pointed to the state of radio as an example of what could happen to the entire industry if media ownership rules were further relaxed. Four days before the field hearing in Richmond, two senators who were serving on the Antitrust Subcommittee in the House of Representatives sent a letter to the Commission deploring the state of diversity in broadcasting (Anselmo, 2003d; Kirkland & Struck, 2003).

As media activists and organizations ramped up their public relations campaign, and as Commissioners Copps and Adelstein held their FCC town meetings, the press intensified its coverage of the issue (Chester, 2007; McChesney, 2004b). Public opposition to the FCC's proposed policy changes only increased and so did the political pressure on Congress. In April, a majority of the members of Senate Commerce, Science, and Transportation Committee sent Powell a letter asking him to delay the June 2 vote (Alpert, 2003; Pelofsky, 2003). In May, both the House and Senate held more hearings, and legislators in both chambers introduced bills to retain the 35% cap on television ownership. During this period, Congress was inundated with phone calls and letters from voters who were opposed to further consolidation in media (Mulkern, 2003a).

Shortly before the Commission voted on the 2002 Biennial Review Order and Notice of Proposed Rulemaking, more than 150 members of Congress from both parties asked the FCC to postpone the vote until they conducted more studies (Labaton, 2003a). After the Commission's vote, public pressure on Congress to revoke the FCC's decision snowballed. Lobbyists from all sides of the issue descended on both houses (Chester, 2007; Klinenberg, 2007; McChesney, 2004a). A wide range of media activists and public interest groups pressed Congress to block the new rules from taking effect. On a single afternoon, House members logged over 40,000 telephone calls about media ownership. Voter opposition to the new rules overwhelmed members of Congress when they traveled back to their districts. By the end of July, the FCC received an additional 1.25 million letters opposing the new rules (Anselmo, 2003d). In August, Powell announced a "Localism in Broadcasting Initiative" formed to create a task force to study how localism could be preserved and he was surely reacting to public pressure (FCC, 2003a). After a series of complicated maneuvers, Congress eventually passed a law that reduced the new 45% National Television Ownership Limit to 39%. The law also changed the biennial review provision of the Telecommunications Act of 1996 to a quadrennial process. There is no doubt that public opinion opposed to media consolidation influenced Congress to act and thus contributed to the policy-making process.

It is reasonable to infer that the Third District Court in Philadelphia considered that public's interest in media ownership limits when it decided the case. When the citizen petitioners asked the court to issue a stay before the new rules could take effect, the court agreed and cited the public's interest in reaching a proper resolution of the case (*Prometheus Radio Project v. FCC*, 2004). Additionally, the stay was issued in part because Congress was expected to pass a resolution rolling back the FCC's new National Television Station Limit. Allowing the new rules to go into effect would also harm the public interest in maintaining the existing rules. While the legal system, in theory, is supposed to remain above the political fray, the issuance of the stay indicates that the justices were well aware of public opinion on the matter. Other evidence that the court was not immune to the range of public comments on the issue includes passages in the opinion that acknowledge the nearly 2 million letters, postcards, emails, and petitions opposing further relaxation of the rules that the Commission received and noting the unofficial hearings that were held by Copps and Adelstein.

Question #5: What are the competing values embodied in the FCC's rulemaking, the public response to that policy decision, and the court's response to those decisions in *Prometheus Radio Project v. FCC*?

The competing values embodied in the FCC's rulemaking can be traced directly to the bifurcated purpose of the agency itself. As demonstrated in earlier chapters, the agency was formed not only to regulate the electromagnetic spectrum and the economic viability of the industries that it presided over, but it was also directed to uphold an idealized environment for social and political discourse. This amalgamation of purpose provided the basis for contests over conflicting values throughout the history of U.S. communications policy. This conflict became particularly acute during the 2002 biennial review process.

In the FCC's 2002 Report and Order and Notice of Proposed Rulemaking, the Commission repeatedly asserted that competition, diversity, and localism were the primary values that informed the decision-making process (FCC, 2003i). Traditionally, the FCC embraced these ideals as the means by which a robust marketplace of diverse and antagonistic sources could be maintained (Aufderheide, 1999; McChesney,1999, 2004b). In the past, when the FCC evoked the primacy of localism, competition, and diversity, the Commission was articulating the means by which it sought to achieve a desirable social end. However, after the passage of the Telecommunications Act of 1996, maintaining a competitive market became an end in itself. Consequently, the desired result of promulgating media ownership regulations was fundamentally realigned. The meaning of the value of competition changed. When Congress and the FCC adopted the mantra of economic efficiency in the market, they neglected to consider that promoting localism and diversity is not always economically efficient.

Additionally, when Congress allowed media owners to consolidate their holdings, they assumed that localism and diversity would be protected by increased video and audio delivery options (Aufderheide, 1999; McChesney, 1999; Price & Duffy, 1997). However, in 2002, the majority of the public received most of their local news and public affairs information from broadcasters (FCC, 2003i). Media mergers in local and national markets meant that consumers had access to fewer independent sources of local news and public affairs programming.

The problem with trying to reconcile the conflicting goals of ensuring the economic viability of broadcasters with the social welfare of the public is evident in the convoluted rationale that the FCC offered for raising the cap on the Nation Television Station Ownership limit (FCC, 2003i). When raising the limit to 45% of the aggregate national audience, the FCC said that there was no evidence to suggest that individually owned stations responded better to community needs than did group-owned stations. In another section of the report, the FCC stated that the only market relevant to diversity is local. Accordingly, the FCC claimed that raising the national limit had no effect on diversity, but raising the limit was important because networks needed to increase their market share in order to compete with an abundance of national sources. Nonetheless, the FCC also stated that it needed to retain a minimal limit so that local affiliates had some leverage with the networks when competing for independent programming and advertising dollars.

In other words, the FCC was arguing that it needed to raise the national television station ownership level in order to ensure than broadcasting would remain competitive on a national level with other video and audio providers (FCC, 2003i). Therefore, the FCC needed to protect the economic welfare of national broadcasters since diversity did not matter in national markets. However, the FCC chose to retain the Dual Network Rules because it said that this rule is necessary to maintain diversity, competition, and localism. Then when the FCC considered the Local Television Multiple Ownership Limit, it said that the existing rule was based on the flawed assumption that only local television stations contribute to viewpoint diversity in local markets. These inconsistencies not only formed the basis for the subsequent remand in *Prometheus Radio Project v. FCC*, but it also indicates that the FCC elevated the economic welfare of the industry it regulated over that of the public that it was mandated to serve. When the FCC created the Diversity Index, it attempted to measure the value of diverse sources using methods that were similar to those used to assess market concentration in antitrust cases. When the FCC attempted to equate the amount of competition in the market for widgets with competition in the marketplace of ideas, it ended up with truly absurd results that counted the *New York Times* as an equal competitor with the Duchess County Community College radio station. Although there is not a lot of difference between screwdrivers made by different manufacturers, there is certainly a difference between the quality and reach of the *New York Times* and the quality and reach of a student radio station. When the FCC attempted to apply economic measures to social policy, it tried to compare apples to oranges.

The public response to the FCC's rules was remarkably consistent and coherent across the political spectrum. Most people were worried about the effect of consolidation on localism and diversity (Chester, 2007; Klinenburg, 2006; McChesney, 2004a). Unions argued that group-owned stations tended to centralize their operations and cut news and other staff in order to boost profits, thereby depriving local communities of an important source of information. A majority of the public responses to the FCC's rulemaking complained that group station owners were less responsive to community needs, and less likely to respond to minority voices in the community. Everyone from the National Rifle Association to the Catholic Conference of Bishops was afraid that the voices of their organizations would be marginalized in the race to attract the largest audience (Beckerman, 2003, Fallows, 2003). The Parents Television Council complained that media corporations encouraged vulgar programming for the sake of high national ratings, whereas locally owned stations would be more responsive to the communities where they held their licenses. Musicians argued that consolidation in radio made it next to impossible for local artists to get airplay and that radio formats had degenerated to the point where only the top grossing artists could get on the air (DiCola & Thomson, 2002;

"Guild President, 2003"). Activists complained that political advertisements on group-owned stations were too expensive, even as corporate policy dictated that only uncontroversial ads would be aired. All of these arguments reflected the public's assumption that there was no viable substitute for broadcast services (McChesney, 2004a). Moreover, these arguments reflected the core belief that the FCC needed to maintain a thriving marketplace of ideas in broadcasting.

When the Court of Appeals in Philadelphia handed down their decision in *Prometheus Radio Project v. FCC*, its chief responsibility was to determine if the FCC had met the standard of review as required by the Administrative Procedures Act. According to the opinion, it is the court's responsibility to ascertain if:

> The agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given. (*Prometheus Radio Project v. FCC*, 2004, p.30)

While the court did have some leeway when it interpreted whether the Commission's rules were Constitutional or whether they followed precedent, the parameters of the legal system limited their ability to look beyond the evidentiary record. Since the FCC presented its evidence in the form of economic and market research, the court was restricted to appraising the quality and consistency of the data it was offered. The court could not simply throw out a rule because it violated any of the normative principles of communication policy.

However, the opinion did address the legitimacy of maintaining diversity, competition, and localism when it reaffirmed the validity and rationale of the spectrum scarcity doctrine (*Prometheus Radio Project v. FCC*, 2004). The opinion stated that the Court had no intention, nor the power, to overturn the Supreme Court decision in *NCCB* (*National Citizens Committee for Broadcasting v. FCC*, 1978). In that case, the Supreme Court stated that there is a substantial and legitimate government interest in promoting diversified mass communications, and therefore limiting common ownership is a reasonable means of promoting the public interest. The Court in *Prometheus* also stated that the abundance of nonbroadcast media had no effect on the limited physical properties of the electromagnetic spectrum.

When the Court remanded the FCC's local television, local radio, and Cross-Media Limits, it did so because the Commission had failed to justify the numerical limits that it chose (*Prometheus Radio Project v. FCC*, 2004). However, the court affirmed that the FCC had the power to impose some restrictions on Cross-Media Limits, stating that some restrictions were necessary in the public interest to guard against an elevated risk of harm to the range and breadth of viewpoints offered to the public. Several sections of the opinion also established that promoting localism, competition, and diversity was a legitimate goal for the agency to pursue.

Despite the restrictions imposed by the legal system, the Third District Court of Appeals allowed the seven normative principles of regulatory policy to influence their decision.[16] This can be inferred from the way the court interpreted section 202(h) of the Telecommunications Act. The court stated that there was no deregulatory presumption in this section; rather the intent of the clause was to mandate that the FCC periodically

---

[16] Napoli (2001) identified seven normative principles that play a role in the regulation of electronic media. They are the First Amendment, the public interest, the marketplace of ideas, diversity, competition, universal service, and localism.

review its media ownership limits to determine if they were still useful in the public interest. If not, then the FCC could modify, repeal, or strengthen the rules, but in order to serve the public interest, the Commission must support its decision with reasoned analysis. This statutory interpretation, along with other passages in the opinion, confirmed that it is in the public interest to promote policies that protect localism, competition, diversity, and the marketplace of ideas. The court also confirmed that it is not a violation of the First Amendment rights of media corporations to limit media ownership. Additionally, one of the reasons why the court rejected the Diversity Index is because not all Americans had access to the Internet, and, therefore, universal access to broadcast services was a factor in the decision.

Interpretive Communities and Conflicting Values

This study began with the theory that the stakeholders in the policy-making process belonged to different interpretive communities and, therefore, based their evaluation of the FCC's policies and procedures during the tenure of Chairman Michael Powell on different sets of assumptions about the meaning of the public interest in media ownership policy (Fish, 1980; Napoli, 2001a; Streeter, 1996; Zelizer, 1994). Each interpretive group was limited by the modes of thought that were available to them, restricted by the knowledge structures that defined them, and restrained by associations that bound them to each other.

More than just a reaction to an extension of a deregulatory trend in media ownership policy that had been ongoing for several decades, the public's response to the prospect of increased consolidation in the media was a protest against the corporate liberal paradigm that dominated the regulation of communications policy. When

Congress abolished the national cap on radio stations and when corporations like Clear Channel and Citadel took control of multiple stations in local markets, the public felt the effects of these mergers immediately. Listeners in communities across the nation heard the results of media consolidation every day on their way to work. When corporate owners fired local announcers and hired consultants to create uniform play-lists piped in to local markets from central locations, many members of the public felt betrayed by the concomitant reduction in local news and the homogenization of local radio formats. When faced with the possibility that the same thing could happen to local television stations and newspapers, the public pushed back against what they saw as the hegemonic forces of the broadcast industry and corporate America. When local stations were purchased by large national corporations, the public perception was that their choices were suddenly more limited and therefore the marketplace of ideas was more limited too. While the FCC presented the proposed rule changes as an economic problem that could be solved by employing the correct methodology, the public interpreted the problem as a social problem that could be solved politically. Many members of the public were not willing to put their faith in the expertise of the agency, nor were they willing to rely on the promise of new technologies.

The public as a whole did not possess the expertise to comment specifically on the intricacies of market analysis that were presented by the FCC (Blevins & Brown, 2006; McGregor, 2006). Most people who were concerned about media concentration were not knowledgeable about the fine points of statistical analysis or quantitative methodology, and fewer still had the time or inclination to wade through the thousands of pages of documents produced over several decades that comprised the historical record of media ownership policy. Most people were not particularly equipped to parse the fine points of legal analysis, and they did not have the capability to produce the type of empirical evidence that the Commission sought. That is not to say that the public was not well informed but rather that their knowledge was experiential and that fact limited the scope of their responses to the FCC's proposed rules.

However, the public and their representatives did possess knowledge about our political system and democratic theory. They understood that they had a right to exercise their power by participating in the policy-making process. When public interest groups formed coalitions and urged individual citizens to write their representatives in Congress, they knew that the sheer number of comments opposing the FCC's proposed rules would allow them to reconstruct the issue on their terms.

Commissioners Copps and Adelstein, both having come to the FCC after serving as Congressional staffers, understood the political process as well. When they planned their cross-country tour, they encouraged public participation in the policy-making process, and they must have hoped that if enough citizens showed up at these events to express their opposition to media consolidation that the other Commissioners would pay attention. Copps was a trained historian, and Adelstein described himself as a life-long public servant who was dedicated to promoting the public interest ("Biography of Adelstein," n.d; "Biography of Copps," n.d.). The professional background and philosophical orientation of both of these men were very different from that of the other Commissioners. Therefore, their analysis of the problem brought them to construct the issue differently.

Chairman Powell came from a military family, served in the Army and as a policy advisor to Richard Cheney in the Department of Defense ("Biography of Powell," n.d.). After earning his law degree, Powell served as the chief of staff of the Antitrust Division at the Department of Justice. At the Antitrust Division, Powell belonged to an interpretive group that used quantitative economic data to support policy decisions, and as an attorney, he belonged to a class of professionals that relied on empirical evidence when arguing cases in court. Powell's professional background induced him to construct policy in economic terms. This habit of thought served to narrow his interpretation of what constituted acceptable evidence. His political affiliation with the Bush administration, an administration that placed a high priority on media deregulation, must have certainly influenced the way he framed the policy goals of his agency. While all of the Commissioners had contact with Congress, members of the public, and representatives from public interest groups, they talked much more frequently to industry insiders. After the formal biennial review process began, the FCC "held seventy-one closed-door, off-the-record meetings with corporate media CEOs and their lobbyists, but only five such meetings with public interest groups" (McChesney, 2004a, p. 18). Clearly, frequent interaction with industry officials who constructed media ownership policy as a roadblock that limited their ability to compete in a multichannel media environment, influenced and constrained the way the FCC interpreted the policy environment.

The broadcast industry was bound by its own interests. Having long benefited by the corporate liberal organization of the regulatory structure of broadcasting, the largest broadcasters were not willing to concede that mergers and consolidation had an impact on the public interest. They feared competition from telecommunications service providers despite their proclamations espousing the glory of the unfettered marketplace. As a community united by common interests and interpretive strategies, broadcasters understood the boundaries of the Commission's inquiry, and they followed the roadmap that was provided to them.

Given that the business of broadcasting is highly dependent on market-driven research, the industry had the resources and motivation to respond to the FCC's queries with the economic data that the agency sought. Although broadcasters may have underestimated the level of public opposition to increased media consolidation, they correctly recognized that it was unlikely that Congress would undertake a major program to reform the structure of broadcasting. Despite all of the anticonsolidation rhetoric on Capital Hill, Congress actually increased the National Television Station Limit to 39%, from the 35% that was required by the Telecommunications Act of 1996. Additionally, the Deregulatory Petitioners in *Prometheus Radio Project v. FCC* were so confident of the validity of their construction of §202(h) that they construed the passage to mean that all media ownership limits should be eliminated. Thus, the Deregulatory Petitioners were bound by the modes of thought that were available to them (Bunker, 2001; Fish, 1980; Streeter, 1996).

Opposition to the FCC's proposed rules by members of Congress surged as press coverage of the issue increased (Beckerman, 2003; "Does Media", 2003; Rosenstiel et al., 2002). As more representatives heard from more constituents, the politicians constructed their rhetoric to include ominous visions of democratic failure, a prophecy that was shared by many voters. Because opposition to media consolidation emanated from all quarters of the political spectrum, Congress has little to lose by browbeating the

Commissioners and by appearing to stand up against corporate titans intent on destroying the marketplace of ideas. If Congress was content to restrict its actions to passing a largely symbolic bill to check the national television ownership limit to 39%, well, as one scholar put it, “communication is a symbolic act whereby reality is produced, maintained, repaired and transformed” (Carey, 1988, p.23). Moreover, the structure of corporate liberalism would not tolerate a more radical reformation of media ownership regulations (Streeter, 1996).

The justices that sat before the bench in *Prometheus Radio Project v. FCC* also belonged to an interpretive community that is inherently conservative and theoretically rational. Although the justices were bound by precedent and strict adherence to formalized practices and procedures, they also possessed a great deal of latitude when defining the meaning of §202(h) (Streeter, 1996). When they decided that there was no deregulatory presumption that mandated the elimination of media ownership rules, they deconstructed the statutory requirements of the law to conform to their own interpretation of the public interest in broadcasting. This was demonstrated by statements that supported the Commission’s right to regulate cross-media ownership, by the court’s reaffirmation of the spectrum scarcity rationale, and by its denial of the Deregulatory Petitioner’s claim that media ownership limits infringed on their First Amendment rights (*Prometheus Radio Project v. FCC*, 2004). All of these findings indicated that the justices elevated the value of past rulings over the argument put forth by the FCC and the Deregulatory Petitioners. Likewise, the court’s insistence that the FCC’s evidence was based on unreasonable and inconsistent evidence was reflective of a pronounced trend toward increased reliance upon empirical research as part of a greater rationalization of policy decision-making (Napoli, 2007). Thus, the conflict over the deregulation of media ownership during the Chairman Powell's tenure can be ascribed to the differing interpretive strategies employed by dissimilar stakeholders in the policy-making process.

Recommendations for Future Research

Since many of the public comments received by the FCC during the 2002 biennial review process were received via electronic mail, it would be very productive if future research was aimed at addressing this phenomenon. During the last review, FCC staffers created a rudimentary coding system that categorized public comments (Holman & McGregor, 2001; McGregor, 2006). Therefore, it would be fruitful to explore whether a more systematic method of compiling the responses to policy initiatives taken by the Commission could be designed and applied to the record. Creative approaches to the evaluation of such documentation could produce a comparative record that would be useful to study over time.

This study has demonstrated that propagation of media ownership regulations is, at least in part, a political problem (Blevins & Brown, 2006). It may be somewhat easier, and more acceptable, to measure the economic effects of a policy decision on a defined market than it is to quantify the results of a policy decision on public opinion, but that does not negate the importance of attempting to do so. The FCC should reach out to political scientists who have experience in conducting research that quantifies and categorizes public opinion in a manner that expands the empirical record. There is no proscription that requires the courts or the FCC to rely exclusively on economic data when assessing the public interest in media policy. Diversifying the scope of evidence generated by researchers addressing FCC policy issues should be a priority for the

Commission.

Lastly, this study has contributed to a more comprehensive understanding of the competing definitions of the public interest in media regulations by adapting the concept of interpretive communities to explore how different interest groups come to define the meaning of commonly used terms and the values that they extract from those concepts. Because meaning is never fixed, additional research exploring how stakeholders in the policy-making process emphasize different interpretive strategies when arriving at conclusions about the possible policy outcomes would contribute to our understanding of how groups achieve consensus.

Policy Implications

The passage of the Telecommunications Act of 1996 not only altered the way in which the communications industry could compete in the marketplace, but it also reformulated the meaning of the public interest in U.S. communications policy (Aufderheide, 1999; McChesney, 1999). Unfortunately, when Congress neglected to elicit widespread public support for its fundamental revision of communications policy, it placed the FCC in the untenable position of having to address the gap between its avowed allegiance to the promotion of localism, diversity, and competition in its policy decisions and the regulatory reality created by the rules it promulgated. While this has been an ongoing concern for the FCC, the stark contrast between the promotion of a corporate liberal agenda and the political and social goal of encouraging a diverse and antagonistic public sphere has never been as clear to the public as it was during the 2002 Biennial Review proceedings.

While legislators may have had compelling reasons for attempting to accomplish a comprehensive rewrite of the Communications Act, it was inevitable that the wide-ranging piece of legislation would include seemingly innocuous provisions without much debate (Mundy, 2003; Schwartzman, Feld, & Desai, 2006). In fact, the inclusion of §202(h) was apparently the result of a compromise between Republican lawmakers and industry groups that wanted to eliminate media ownership caps completely and Democratic legislators that wanted to maintain the existing limits. At the time, the National Television Station Ownership Limit was at 25%. The House wanted the limit raised to 50% and GOP Senators wanted it eliminated altogether. After much haggling, the lawmakers agreed to raise the limit to 35% in the spring of 1995. Realizing that it was unlikely that the caps would be raised further, two Congressional lobbyists for Rupert Murdock's NewsCorp, Peggy Binzel and Preston Padden, forwarded a plan to Senator John McCain (R-AZ) that would insert the language contained in §202(h) into the Act. According to Mundy, (2003) several GOP Senators who sat on the Commerce Committee figured that if the FCC had to "repeal or modify any regulation that it determines to be no longer in the public interest" every 2 years, the FCC would fail to do the full justification required to fend off court challenges to any existing ownership rules (p. 5).

On Christmas Eve 1995, Senator Larry Pressler (R-SD), Senator Fritz Hollings (D-S.C.), and Senator John Dingell (D-Mich.) signed off on §202(h). There was no public discussion of the intent of the committee members who inserted this provision into the 1996 Telecommunications Act, nor was there any member of the committee who was willing to take credit for the drafting of the clause. While it is likely that the original members of the Committee on Commerce, Science, and Transportation understood the ramifications of §202(h), it is also reasonable to assume that a majority of the members of Congress had not given this section their full attention, considering that the full text of the act was 333 pages long. The insertion of §202(h) was, as Schwartzman et al. (2006) called it, "a successful legislative ambush" by a special interest group that was allowed to essentially write what would prove to be a critical component of the omnibus rewriting of the Communications Act of 1934 (p.581). Additionally, Congress ceded its statutory authority to the FCC when it ordered the agency to reconsider its media ownership rules every 2 years. While the insertion of §202(h) in the Telecommunications Act of 1996 may have temporarily shielded Republican senators from the political ramifications of voting to eliminate media ownership limits altogether, it ended up intensifying the political pressure on the FCC and ultimately during the summer of 2003 on Congress itself.

As previously documented in Chapter 3, the first Biennial Review under the direction of Chairman William Kennard took 2 years for the FCC to complete. This meant that the FCC was required by statute to begin its second review only a few months after completing its first. Although the FCC under Kennard voted to uphold most of the media ownership restrictions that were still in place after the passage of the 1996 Telecommunications Act, Kennard's FCC modified cross-media restrictions with the new eight-voice rule. However, even before the FCC had even issued its findings, in 2000 NewsCorp had already hired attorneys to challenge the first review (Mundy, 2003; Schwartzman et al., 2006). When the DC Court of Appeals found the FCC's rationale for supporting the eight-voice rule and the national television ownership limit untenable, FCC Chair Michael Powell declared that the courts were forcing his hand before the 2002

Biennial Review.

As the consequences of liberalizing media ownership restrictions after the Telecommunications Act became apparent to the public and to media advocacy organizations, members of Congress began paying attention to the provisions of §202(h). When it became evident that Powell planned to modify or eliminate the rules that had made it through the Communications Act rewrite, only then did lawmakers begin to speak out against media consolidation and FCC policy under Powell. When public opposition to the 2002 Biennial Report and Order could no longer be ignored, Congress finally passed a compromise bill that raised the National Television Station Ownership Limit to 39%. This symbolic gesture did not address the problem of media consolidation, it did not address the problem of ceding its statutory responsibility to an administrative agency, and it did not address the problem of defending FCC rules in court. Congressional failure to accept responsibility for the passage of §202(h) only ensured that court dockets would be filled with challenges to media ownership restrictions. On the basis of this analysis, therefore, §202(h) should be repealed.

While Congress certainly bears some amount of responsibility for the 2002 Biennial Review debacle, this does not absolve Powell of his share of the blame. Powell was so wedded to the ideology of the free market and his belief in the discourse of new technology that he let his own preconceived regulatory agenda dictate the entire review process. When Powell kicked off the review procedures with the Roundtable Discussion on Media Ownership, he missed an opportunity to consider how differing perspectives on the issue might influence the ensuring debate. Even though Powell chose to invite panelists who relied on market data and economic analysis to support his own predilection towards his deregulatory policies, many of the panelists urged him to consider the issue from a wider perspective. Most of the experts on the panel agreed that economic data should not be used exclusively to define the public interest. These analysts asked Powell to enlarge his definition of competition from a strictly market-based approach to one that also encompassed competition in the marketplace of ideas. Still, Powell ignored the advice of his own handpicked panel and neglected to consider the social ramifications of loosening media ownership regulations.

Powell's insistence that the Internet and other communication technologies offered consumers a diverse array of media choices ignored the reality that increased delivery options do not necessarily equal increased diversity of credible content, especially in regard to local news and public affairs. While Powell's interpretive community had access to increased communication options, the majority of American citizens in 2003 still relied on their local television network affiliates to deliver local news and information. Although many consumers were accessing media content online, most of that content was not produced exclusively for the Internet; rather it replicated what was available through traditional media outlets. Even though there was a multitude of information available on the Internet, not all sources are of equal importance, and the Diversity Index failed to take that into account. The FCC under Powell's leadership was so intent on devising a way to measure markets that it failed to remember why they were measuring markets in the first place. Although it is fair to say that the type of research that the FCC engaged in was a legitimate way to approach the problem of media ownership in a rapidly changing communication environment, this research only addressed a small aspect of the FCC's dilemma. Though it is indisputably the FCC's responsibility to promulgate policy that allows the industry to remain economically healthy, it is also the agency's responsibility to ensure that the public's interest is served at the same time. It is all well and good that consumers have access to multiple forms of entertainment, but it is imperative that citizens have access to the information they need to participate in a self-governing democracy. Powell's lack of attention to this aspect of the function of media in a democracy surely contributed to the court's decision in *Prometheus v. FCC* (2004). When Powell formulated his conception of the importance of competition in media markets, he neglected to take into consideration the value of competition in the marketplace of ideas.

Additionally, Powell's disregard for the political ramifications of media ownership policy was a blind spot that doomed his policy initiatives to failure. It is understandable that Powell felt that it was his primary responsibility to provide empirical evidence to support his policies, but it was simply naïve of him to think that widespread public opposition to his proposals was not worthy of consideration. Many communication scholars have theorized that regulatory capture has rendered the FCC as a failed agency, but even if this is the case, the FCC is required to at least acknowledge the pretense that the public has a voice in its decisions. The FCC received more comments on this issue than on any other issue in its history; clearly, Powell's choice to isolate himself from the politics of regulation was a consequential mistake.

The courts should also shoulder some responsibility for the FCC's failures. When the DC Circuit consistently undermined the FCC's ability to uphold media ownership limits based on a narrow interpretation of §202(h), it attenuated the agency's authority to consider if its policy was serving the public interest. The court's assumption that

Congress had directed the FCC only to or modify its media ownership regulations would have stripped the FCC of its authority to affirm its existing rules even if they did further the public interest (Prometheus v. FCC, 2004). As the Prometheus Court ruled, §202(h) contained no statutory presumption toward deregulation; rather it required the Commission "...to justify its decision to retain, repeal, or modify any of its rules with a reasoned analysis (Prometheus v. FCC, 2004, p. 42). Furthermore, the Prometheus Court ruled that the Fox and Sinclair Court's characterization of the deregulatory presumption of §202 (h) was a "crabbed reading" of the statute that would have curtailed the FCC's traditional administrative law authority.

As the courts have demanded that the FCC and other policy-making agencies meet a greater standard of reasoned analysis in its decision-making process over the last several decades, the FCC and other regulatory agencies have come to rely more heavily on empirical research to support their policies in court (Albaek, 1995; Napoli, 2007). It is indisputable that this type of research can be useful for measuring markets and other problems that can be quantified, however, critics have noted that excessive reliance on market analysis, and other economic data can marginalize the role of value judgments in the decision-making process. It is certainly the case that Chairman Powell marginalized the importance of democratic and political values during the 2003 Biennial Review process, but the courts should also be held responsible for depending so heavily on empirical data. The courts need to expand the scope of evidence that they will accept to support a reasoned analysis of policy, and the courts need to acknowledge that empirical analysis can be just as value laden as qualitative research. The courts need to look at the a more broadly based perspective from which to render better informed decisions.

Epilogue

Powell was correct in his assessment that the competitive environment for broadcasters and other content providers had changed radically since the passage of the Telecommunications Act. There are more media platforms and more ways of delivering audio and video content than ever before. Shortly after taking office, current FCC Chair Julius Genachowski unveiled a proposal to develop a national broadband plan (" FCC Sends," 2010). The plan would have attempted to guarantee near universal access to high-speed Internet connections, and it would have effectively usurped broadcaster's domination of the electromagnetic spectrum by asking them to voluntarily relinquish unused space so that it could be auctioned off to broadband service providers. However, in April 2010, the DC Court of Appeals ruled in *Comcast v. FCC* (2010) that the FCC has no authority to regulate the Internet. Genachowski later announced that the Commission would be seeking public comment on a new compromise approach to constructing a regulatory framework that would hold up in court (Genachowski, 2010). A subsequent initiative by House Energy and Commerce Committee Chairman Henry Waxman (D-Calif.) to codify net neutrality rules failed to make it out of committee (Chang, 2010).

It is also fair to say that the policy-making environment in which the FCC forwarded its proposed changes to its media ownership rules in 2003 has also changed since Michael Powell's tenure. When Congress rolled back the National Television Ownership Rule to 39% from 45% after the 2003 Biennial Review, it also amended §202(h). Instead of requiring a biennial review of media ownership rules, the FCC now is required to conduct its review quadrennially.

Responding to changes in the media environment, in 2006, the FCC under the direction of FCC Chair Kevin Martin, loosened Newspaper/Broadcast Cross Ownership restrictions. The FCC now allows cross-ownership between a daily newspaper and a broadcast station if the television station is not among the top four ranked stations in a market and if at least eight independent “major media voices” remain in the market (Report and Order, 2007).

In preparation for its 2010 Biennial Review, the FCC has been holding a series of Media Ownership Workshops across the country, and the Commission has gone to great lengths to solicit public participation in the decision-making process (FCC, 2009). This is a laudatory development. However, the Third District Court of Appeals recently announced in March 2010, that it would lift the stay on the FCC’s Newspaper/Cross-Ownership Limits that has been in effect since *Prometheus Radio Project v. FCC*, perhaps due to the FCC’s inability to devise a new plan (McConnell, 2010). While the regulatory climate may have changed since 2003, the failure to address many of the underlying assumptions, contradictions, and conflicts that are contained in the regulatory regime will continue to afflict the Commission and the courts in the future.

The discourse of technology is alive and thriving in regulatory quarters. Once again, citizens are being asked to place their faith in the power of new delivery systems to provide us with a more perfect form of a participatory democracy. It remains to be seens if Genachowski can create a broadband plan that will withstand the scrutiny of the courts. Given the current political climate as the midterm elections approach, it seem unlikely that Congress will pass a bill that authorizes the FCC to expand its authority over the Internet, and the prospect of passing a bill guaranteeing net neutrality in the near future also remains in doubt.

The tension between capitalism and the collective social welfare of our nation will continue to influence media ownership policy in the future. There is no reason to believe that the corporate liberal organization of society will produce different results just because the advent of a new-age technology is upon us. In fact, there is reason to suspect that the continuing decline in the size of mass media audiences will create more problems for democracy than broadband or cable or other delivery systems can solve. For better or for worse, mass media have had an instrumental role in the development of a national culture. As audiences become more fragmented, how they recreate any semblance of a national political discourse without having free over-the-air broadcasting to unite them? If citizens are moving toward a future where most media will be delivered via broadband, how will the FCC's commitment to promoting localism be maintained? John Armstrong (2002) demonstrated how difficult it was for the FCC to create policies that supported localism when regulating commercial television during its infancy. It is equally important that policy-makers now ask how local communities that are currently defined by broadcast markets will be defined and served by broadband or other technologies. If providing local news and public affairs programming becomes unprofitable for broadcasters, who will step in to fill the void? There are no easy solutions to these problems and §202 (h) ensures that the issue of media ownership and the public service obligations of broadcasters will continue to generate controversy as long as the law requires the Commission to uphold the public interest.

REFERENCES

Abernathy, K. (2001a). Separate statement of Kathleen Abernathy. In re: Transfer of control of broadcast licenses held by subsidiaries of Chris-Craft Industries Inc. to Fox Television Stations Inc, File nos. BALCT-20000918ABB, et al. Retrieved from http://www.fcc.gov/Speeches/Abernathy/Statements/2001/stkqa102.html

Abernathy, K. (2001b). A perspective from FCC Commissioner Abernathy. *The United States International Telecommunications Union Association Newsletter*. Retrieved from http://www.fcc.gov/Speeches/Abernathy/Articles/2001/arkqa101.html

Abernathy, K. (2002). My view from the doorstep of FCC change. *Federal Communications Law Journal, 54*, 199-122.

Abernathy, K. (2003). *Written statement of Kathleen Abernathy on the 2002 Broadcast Ownership Biennial Regulatory Review*. Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235127A2.pdf

Adelstein, J. S. (2003a). *Big macs and big media: The decision to supersize.* Speech presented at the Media Institute, Arlington, VA. Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-234736A1.pdf

Adelstein, J. S. (2003b). *Statement of Commissioner Jonathon S. Adelstein dissenting: 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*. Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A8.pdf

Adelstein, J. S. (2003c). *Statement of FCC Commissioner Jonathan S. Adelstein, FCC Commissioner Jonathan S. Adelstein before the Senate Committee on Commerce, Science, and Transportation Hearing on FCC Oversight.* Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235162A2.pdf

Administrative Procedure Act, Public Law No. 79-404, 60 Stat. 237 (1946).

Aguilar, M. (1999). Micro-radio: A small step in the return to localism, diversity, and competitiveness in broadcasting. *Brooklyn Law Review*, *65*, 1133, 1115-1156.

Ahrens, F. (2003a, May 28). FCC plan to alter media rules spurs growing debate. *Washington Post*, p. A1.

Ahrens, F. (2003b, June 20). Senate panel approves tougher media rules. *Washington Post*, p. E1.

Ahrens, F. (2005, January 28). FCC drops bid to relax media rules: Agency sought fewer limits on ownership, *Washington Post*, p. A1.

Airline Deregulation Act (1978). Public Law No. 95-504, 92 Stat. 1705.

Albiniak, P. (2000, February 21). LPFM battle lines drawn. *Broadcasting & Cable, 130*(8) 7.

Albiniak, P. (2003, April 14). Mark your calendars for media rules. *Broadcasting & Cable, 133,* 38-40.

Alleven, M. (2001, April 16). Powell's dream team. *Wireless Week, 7*(16), 4.

Alpert, B. (2003, April 9). Debate heating up over deregulation of media ownership. *Newhouse News Service*, p. 1.

Angevine, E. (1969, Winter). The Consumer Federation of America. *Journal of Consumer Affairs*, *3*(2), 152-156.

Anselmo, J. (2003a, June 7). FCC media ownership changes prompt plans for opposition, but House leaders not prepared to act. *CQ Weekly*, *61,*1394.

Anselmo, J. (2003b, June 28). Senate committee toughens media ownership restrictions in second swipe at FCC. *CQ Weekly, 61,*1627.

Anselmo, J. (2003c, July 12). Focus on media ownership issue takes lawmakers by surprise. *CQ Weekly*, *61*, 1831.

Anselmo, J. (2003d, July 26). Lawmakers underestimate public concern about FCC media ownership rule. *CQ Weekly, 61,* 1903-1905.

Appropriation Act of 2004, P. L. No. 108-199, H.R. 2799, 108th Cong.1. (2004).

Archer, G. L. (1938). *History of radio to 1926*. New York: American Historical Society, Inc.

Armstrong, D. (1981). *A trumpet to arms*. Boston: South End Press.

Armstrong, J. S. (2002). *Localism, community, and commercial television, 1948-1960: A value analysis*. Unpublished doctoral dissertation, University of Utah, Salt Lake City.

Armstrong, J. S. (2006). Applying critical theory to electronic media history. In D.G. Godfrey (Ed.), *Methods of historical analysis in electronic media* (pp. 145-166). Mahwah, NJ: Lawrence Erlbaum Associates, Inc.

Associated Press v. United States, 326 U.S.1 (1945).

Aufderheide, P. (1999). *Communications policy and the public interest: The Telecommunications Act of 1996*. New York: Guilford Press.

Austin, C. (1983, August 28). After 30 years, this media watchdog is still viligent. *New York Times,* p. A23.

Avery, R. K. (Ed.)(1993). *Public service broadcasting in a multichannel environment: The history and survival of an ideal*. White Plains, NY: Longman.

Avery, R. K. (2001, Summer). Exploring the expanding domain of public telecommunications research. *Journal of Broadcasting & Electronic Media, 45*(3), 537-540.

Avery, R. K. (2005). Public service broadcasting and cultural context: Comparing the United States and European experience. In G.F. Lowe & P. Jauert (Eds.), *Cultural dilemmas in public service broadcasting* (pp.199-209). Goteberg, Sweden: Nordicom.

Avery, R. K. (2007). The Public Broadcasting Act of 1967: Looking ahead by looking back. *Critical studies in Media Communication, 24*(4), 358-364.

Avery, R. K., & Pepper, R. (1976). The evolution of the CPB-PBS relationship 1970-1973. *Public Telecommunications Review, 7(*2), 19-30.

Avery, R. K., & Stavitsky, A. G. (2003). The FCC and the public interest: A selective critique of U.S. telecommunications policymaking. In M.P. McCauley, E. E. Peterson, B. L. Artz & D. Halleck (Eds.), *Public broadcasting and the public interest* (pp. 52-61).

Bagdikian, B. H. (2000). *The media monopoly* (6th ed.). Boston: Beacon Press.

Baker, D. (2002). *Democracy unhinged, more media concentration means less public discourse: A critique of the FCC studies on media ownership.* Washington, DC: Center of Economic and Policy Research.

Ahrens, F. (2003c, September 4). Court blocks media ownership rules: Momentum grows to halt FCC change. *Washington Post*, p. 3A.

Balough, M. (1996, April). Showing that we care, no matter the story, the medium. *Quill, 84*(3), 2.

Barnouw, E. (1966). *A tower in Babel: A history of broadcasting in the United States: Vol.1 to 1933*. New York: Oxford University Press.

Barnouw, E. (1968). *The golden web: A history of broadcasting in the United States: Vol.2 to 1933-1953*. New York: Oxford University Press.

Barnouw, E. (1970). *The image empire: A history of broadcasting in the United States: Vol.3 since 1953*. New York: Oxford University Press.

Bateman, K. (2000, February 7). Regulation/radio interference in DC. *MediaWeek, 10*(3), 8B.

Baughman, J. L. (1981). *Warriors in the wasteland: The Federal Communications Commission and American television, 1958-1967*. Unpublished doctoral dissertation, Columbia University, New York.

Baxter, L. A., & Babbie, E. (2004). *The basics of communication research*. Belmont, CA: Thomson Wadsworth.

Beckerman, G. (2003, November/December). Tripping up big media. *Columbia Journalism Review, 42*(4), 15-20.

Benjamin, L. (1998). Working it out together: Radio policy from Hoover to the Radio Act of 1927. *Journal of Broadcasting and Electronic Media, 42*(2), 221-236.

Benton Foundation. (n.d.). *About us*. Retrieved from http://www.benton.org/about

Berry, S. T., & Waldfogel, J. (1999, February). Public radio in the United States: Does it correct market failure or cannibalize commercial? *Journal of Public Economics, 71*(2), 189-212.

Berry, S. T., & Waldfogel, J. (2001). Do mergers increase product variety? Evidence from radio broadcasting, *Quarterly Journal of Economics*, *116*(3), 1009-1025.

Besen biography. (n. d.). *CRA International web site*. Retrieved from http://www.crai.com/ProfessionalStaff/listingdetails.aspx?id=1268

Besen, S. (2001). Statement of Stanley M. Besen. *Roundtable on FCC Ownership Policies*. Retrieved from http://www.fcc.gov/ownership/roundtable_docs/besen-stmt.pdf

Blackly, R. J. (1979). *To serve the public interest: Educational broadcasting in the United States*. Syracuse, NY: Syracuse University Press.

Blevins, J. L., & Brown, D.H. (2006). Political issue or policy matter? The U.S. Federal Communications Commission's Third Biennial Review of broadcast ownership rules. *Journal of Communication Inquiry, 30*(1), 21-41.

Bloom, D. (2003, April 8). Diller disses dereg. *Daily Variety,* p. 18.

Biography of Jonathan S. Adelstein (n.d.). Retreived from http://www.fcc.gov/commissioners/previous/adelstein/biography.html

Biography of Kathleen Q. Abernathy (n. d.). Retrieved from http://www.fcc.gov/commissioners/previous/abernathy/biography.html

Biography of Kevin J. Martin (n. d.). Retrieved from http://www.fcc.gov/commissioners/previous/martin/biography.html

Biography of Michael J. Copps (n. d.). Retrieved from http://www.fcc.gov/commissioners/copps/biography.html

Biography of Michael K. Powell (n. d.). Retrieved from http://www.fcc.gov/commissioners/previous/powell/biography.html

Biography of William E. Kennard (n.d.). Retrieved from http://www.fcc.gov/commissioners/previous/kennard/biography.html

Bischoff, G. (2003, September 22). Venue change could backfire on challengers of FCC order. *Telephony, 244.* 22-24.

Bollinger, L. C. (1986). *The tolerant society: Freedom of speech and extremist speech in America*. New York: The Oxford University Press.

Bozell Biography, (n.d.). *Media Research Center*. Retrieved from http://www.mediaresearch.org/bios/lbb/welcome.asp

Brady, S. (2003, January 20). Media ownership forum draw Powell and co. *Cable World, 15*(3*),* 6.

Braman, S. (2003). Policy as a research context. In S. Bramen (Ed.), *Communication researchers and policy-making*. Cambridge, MA: MIT Press.

Brand, K. (2004). The rebirth of low-power FM broadcasting in the U.S. *Journal of Radio Studies, 11*(2), 153-168.

Brenahan, F., & Reiss, P. C. (1991). Entry and competition in concentrated markets: Empirical industrial organization. *Journal of Political Economy, 99*(5), 997-1009. Brown, K. & Williams, G (2002). *Consolidation and advertising prices in local radio markets: Media ownership working group study #4*. Retrieved from http:// www.fcc.gov/ownership/materials/already-released/consolidation090002.pdf.

Brown, L. (1971). *Television: The business behind the box*. New York: Harcourt Brace Jovanovich.

Bunker, M.D. (2001). *Critiquing free speech: First Amendment theory and the challenge of interdisciplinary*. Mahwah, NJ: Lawrence Erlbaum Associates, Inc

Burr, R. (2003, April 1). *Statement of Congressman Richard Burr* [Press release]. Retrieved from LexisNexis.

Bush, C. A. (2002). *On the substitutability of local newspaper, radio, and television advertising in local business sales: Media ownership working group study #10*. Retrieved from http://www.fcc.gov/ownership/materials/already-released/substitutability090002.pdf

Cable Communications Policy Act, P. L. No. 98-549, 98 Stat. 2780 (1984).

Cable Television and Consumer Protection Act, P. L. No. 102-385, 106 Stat. 1460 (1992).

Cable/Broadcast Cross-Ownership Rule, 47 C.F.R. § 76.501(a) (1998).

Campbell, K. (2003, May 30). Are bigger voices better voices? With FCC expected to relax ownership rules Monday, the media industry faces static from a public wary of consolidation. *Christian Science Monitor*, p. 3.

Carey, J. W. (1988). *Communication as culture: Essays on media and society*. New York: Routledge.

Carlson, C. (2001, April 16). Bush names insiders to FCC. *eweek, 18*(15), 40.

Carter, B. (2010, April 1). Ratings fall on newscasts at two networks. *New York Times*, Retrieved from http://www.nytimes.com/2010/04/02/business/media/02tele.html?ref=todayspaper

Carter, T. B., Dee, J. L., & Zuckman, H. L. (2000). *Mass communication law* (5th ed.). St. Paul: West Group.

Caruso, D. (2003, September 10). A win for pirate radio: Renegade broadcast group persuades court to block FCC rules. *San Antonio Express*, p. E3

Chaffee, Z. (1919). Freedom of speech during wartime. *Harvard Law Review 32*(8) 932-973. *Economics 16*(1) 416 –460.

Chandler, A. D. Jr., Bruchey, S., & Galambos, L. (Eds.). (1968). *The changing economic order: Readings in American business and economic history*. New York: Harcourt, Brace & World.

Chang, C. (2010, September 30). Mixed corporate reactions to next moves on net neutrality. *Washington Post*. fromhttp://voices.washingtonpost.com/posttech/2010/09/mixed_corporate_reactions_to_n.html.

Chester, J. (2004, January 21). Michael Powell's legacy: Weaker public interest, more powerful conglomerates, less competition, higher prices: His hubris has awakened public to dangers of consolidation. *Center for Digital Democracy*. Retrieved from http://www.democraticmedia.org/news/PowellFarewell.html.

Chester, J. (2007). *Digital destiny: New media and the future of democracy*. New York: The New Press.

Clear Channel criticizes FCC decision President & COO Mark Mays says FCC 'chose politics over the public interest' (2003). [Press release] Retrieved from LexisNexis.

Coalition for Networked Information. (n. d.). Retrieved from http://www.cni.org/

Cochran, J., & Stevens, A. (2003, October 4). Internet-based activist group puts powerful spin on politics. *CQ Weekly*, *61,* 2424-2425.

Colten, R. D. (1993). *The regulation of rural electric cooperatives: The common law, consumer law and a cornucopia of customer protections.* Washington, DC: National Consumer Law Center.

Columbia Law School Kernochan Center for Law, Media, and the Arts announces a forum on the FCC media ownership rules (2003, January 13) [Press release]. *Media Ownership Rules Forum*. Retrieved from http://www.law.columbia.edu/media_inquiries/news_events/2003/January_2003/media_owner?#572

Columbia media ownership rules forum (2003). [Webcast] Retrieved from http://www.columbia.edu/acis/networks/advanced/kernochan-media-ownership

Columbia's forum on media ownership: Convergence chaser special coverage. (2003, April 29). *Poynter Online*. Retrieved from http://www.poynter.org/content/content_view.asp?id=17147

Common Cause. (n. d.). *About us*. Retrieved from http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=4860183

Competition issues in the telecommunications industry: Hearing before the Committee on Science, Commerce, and Transportation, Senate, 108th Cong. 1 (2003).

Condit, C. M., & Lucaities, J. L. (1993). *Crafting equality: America's Anglo-African word*. Chicago: University of Chicago Press.

Conrad, M. A. (1989). The demise of the Fairness Doctrine: A blow for citizen access. *Federal Communications Law Journal, 41*(2)161-194.

Consolidated Appropriations Act, H.R. 2673, 108th Cong. 2, §629 (2004).

Consumer Federation of America (n. d.). *About CFA*. Retrieved from http://www.consumerfed.org/about.cfm

Consumers Union. (n. d.). *About Consumers Union*. Retrieved from http://www.consumersunion.org/about/

Cooper, M. N. (2001, October 29). Statement of Dr. Mark N. Cooper. *Roundtable on FCC ownership policies*. Retrieved from http://www.fcc.gov/ownership/roundtable_docs/cooper-stmt.pdf

Cooper, M. N. (2003). *Media ownership and democracy in the digital information age: Promoting diversity with First Amendment principles and market structure analysis*. Stanford, CA: Center for Internet & Society.

Cooper, M. N. (2007). *The case against media consolidation: Evidence on concentration, localism and diversity*. Stanford, CA: Creative Commons.

Cooper, M. N. & Herold, S. (2004, January 29). New media usage survey shows FCC based media ownership rules on faulty information: Newspapers twice as important source for local News than FCC found. Retrieved from http://www.consumersunion.org/pub/core_telecom_and_utilities/000785.html

Coopman, T. (1999). FCC enforcement difficulties with unlicensed micro-radio. *Journal of Broadcasting and Electronic Media, 43,* 582-602.

Coopman, T. (2000a). Dunifer v. the FCC: A case study of micro broadcasting. *Journal of Radio Studies*, *7*, 287–309.

Coopman, T. (2000b). Hardware handshake: Listserv forms backbone of national free radio network. Retrieved from http://www.acjournal.org/holdings/vol3/Iss3/articles/ted_coopman.htm#top

Copple, R. F. (1991). Cable television and the allocation of regulatory power: A study of governmental demarcation and roles. *Federal Communications Law Journal*, *44*, 1.

Copps, M. J. (2001). *Statement of Commissioner Michael J. Copps Re: Applications for the assignment of Chris Craft Television Licenses to Fox Television Stations, Inc*. Retrieved from http://www.fcc.gov/Speeches/Copps/Statements/2001/stmjc104.html

Copps, M. J. (2002a). *Remarks by Commissioner Michael J. Copps.* Paper presented at the Everett Parker Ethics in Communications Lecture, Washington, DC Retrieved from http://www.fcc.gov/Speeches/Copps/2002/spmjc211.pdf

Copps, M. J. (2002b). In the matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996: Concurring statement of Commissioner Michael J. Copps, MB Docket No. 02-xxx C.F.R.

Copps, M. J. (2002c). *Remarks.* Paper presented at the United States Conference of Catholic Bishops, Washington, DC. Retrieved from http://www.fcc.gov/Speeches/Copps/2002/spmjc201.html

Copps, M. J. (2002d). Commissioner Michael J. Copps expresses "alarm and disappointment" with FCC's media concentration decision [Press release]. Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-02-2989A2.pdf

Copps, M. J. (2003a). *Media concentration bench remarks*. Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A5.pdf

Copps, M. J. (2003b). *Remarks Columbia Law School Forum on Media Ownership*. Paper presented at the Columbia Law School Media Forum. Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-230398A1.pdf

Copps, M. J. (2003c) *Statement of Michael J. Copps, Commissioner Federal Communications Commission before the Senate Committee on Commerce, Science, and Transportation*. Retrieved fromhttp://hraunfoss.fcc.gov/edocs_public/ attachmatch/DOC-235127A3.pdf

Copps, M. J. (2003d). *Statement of Michael Copps, dissenting: 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*. Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC235047A9.pdf

Corn-Revere biography. (n.d.). *Davis Wright Tremaine LLP*. Retrieved from http://www.dwt.com/people/RobertCornRevere

Cox, J. (2003, April 1). Executives, activists at university meeting speak out against media consolidation. *News & Observer,* p.1.

Crabtree, S. (2003a). Pols move to push for reforms at FCC. *Daily Variety*, p. 7.

Crabtree, S. (2003b). U.S. reps press for vote on rollback of FCC regs. *Daily Variety, 281*, 4-6.

Creswell, J. W. (2003). *Research design: Qualitative, quantitative, and mixed methods approaches* (2nd ed.). Thousand Oaks, CA: Sage Publications.

Cunningham, B. C., & Alexander, P. R. (2002). *A theory of broadcast media concentration and commercial advertising: Media ownership working group study #6*. Retrieved from http://www.fcc.gov/ownership/materials/already-released/theory090002.pdf.

Czitrom, D. J. (1982) *In the media and the American mind: From Morse to McLuhan*. Chapel Hill, NC: University of North Carolina Press.

Dale, M. D. (2004). *The structure of regulatory competition: corporations and public policies in a global economy*. New York: Oxford University Press.

Davidson, P. (2002, October 2). FCC studies lean to deregulation. *USA Today*, p. 3B.

Davidson, P. (2003a, January 31). Singers take on big radio; relaxed rules on ownership hurt industry, they say. *USA Today*, p. B3.

Davidson, P. (2003b, February 24). FCC member not afraid of dissent; Republican beat Chief Powell in game of savvy. *USA Today*, p. B.07. Retrieved June 27, 2009, from ProQuest Newsstand database. (Document ID: 293697781)

Davidson, P. (2003c, April 21). FCC changes tack on media merger rules: Clear limits gain favor over case-by-case analysis. *USA Today*, p. B1.

Davidson, P. (2003d, June 3). FCC ruling likely to generate appeals. *USA Today*, p. B3.

Davidson, P. (2003e, June 5). Lawmakers question media rule changes. *USA Today*, p. B2.

Davidson, P. (2003f, September 17). Senate votes no on new media rules. *USA Today*, p.B3.

Day, J. (1995). *The vanishing vision: The inside story of public television*. Berkeley, CA: University of California Press.

DeClerk, S. N. (2005). Prometheus Radio Project v. FCC: Where will the media deregulation trend end? *Arkansas Law Review, 58*, 705.

Dewey, J. (1991). *The public and its problems*. Athens, OH: Swallow Press.

DiCola, P., & Thomson, K. (2002, November 18). *Radio deregulation: Has it served citizens and musicians?* Retrieved from http://futureofmusic.org/files /FMCradiostudy.pdf.

Does ownership matter in local television news: A five-year study of ownership and quality (2003, April 29). Washington, D.C.: Project in Excellence in Journalism. Retrieved from http://www.journalism.org/node/243

Dominick, J. R., & Pearce, M. C. (1976). Trends in network prime time programming 1953-74. *Journal of Communication, 26*, 70-80.

Douglas, S. (1987). *Inventing American broadcasting: 1899-1922*. Baltimore: Johns Hopkins University Press

Dreazen, Y. J. (2003a, June 4). Democrats seize on FCC rule —Presidential hopefuls paint Bush as too close to corporations. *Wall Street Journal,* p. A4.

Dreazen, Y. J. (2003b, September 4). Leading the news: Judges stay new FCC media rules; Appeals-Court order blocks ownership regulations from taking effect today. *Wall Street Journal,* p. A4.

Duopoly/Eight Voices Rule, 47 C.F.R. § 73.2555(b)(1998).

Einstein, M. (2002, September). *Program diversity and the program selection process on broadcast network television: Media Ownership Working Group Study #5*. Retrieved from http://www.fcc.gov/ownership/materials/already-released/programdiversity090002.pdf.

Einstein, M. (2003, April 28). Dereg? We should talk re-reg. *Broadcasting & Cable, 133*, 50.

Emord, J. W. (1989). The First Amendment invalidity of FCC ownership regulations. *Catholic University Law Review, 38*, 401-469.

Engelman, R. (1996). *Public radio and television in America: A political history*. Thousand Oaks, CA: Sage Publications

Enrich, D. (2003, May 27). Copps, Adelstein host roundtable discussion against relaxed ownership rules. *States News Service*. Retrieved from LexisNexis.

Fagerheim, B., & Amato, S. (1998). The Benton Foundation. *College & Research Libraries News, 59*(5), 371-373.

Fallows, J. (2003, September). The age of Murdock. *Atlantic Monthly, 292*, 80-98.

FCC: Chairman backs index to measure media concentration (2003, April 9). *Chicago Tribune*, p. 2.

FCC commish endorses WGA push for hearings (2002, November 25). *Daily Variety, 277*, 2.

FCC v. League of Women Voters, 468 U.S. 364 (1984).

FCC Media Ownership: Hearing before the Senate Commerce, Science, and Transportation Committee, Senate, 108th Cong., 1 (2003).

FCC Oversight: Hearing before the Science, Commerce, and Transportation Committee, Senate, 108th Cong. 1 (2003).

FCC sends national broadband plan to Congress: Plan details actions for connecting consumers, economy with 21st century networks. (2010, March 16). Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296880A1.pdf.

FCC takes first step to raise TV limits. (1992, May 18). *Broadcasting, 122* (21), 3.
.

Federal Communications Act of 1934, 47 U.S.C. 151(1934).

Federal Communications Commission. (1946). *Public Service Responsibilities of Broadcast Licensees* ("Blue Book"). Washington, DC: Federal Communications Commission.

Federal Communications Commission (1993). *Second Report and Order, No. 90-162*, 47 C.F.R. § 73.659 - 73.663 (1993).

Federal Communications Commission (1998). *Notice of Inquiry in the Matter of Elimination of Experimental Broadcast Stations.* MM Docket No. 98-35. http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-01-99A1.pdfFederal Communications Commission. (1999a). *Notice of Proposed Rulemaking:* MM Docket No.99-25. Retrieved from http://www.fcc.gov/Bureaus/ Miscellaneous/Filings/fl990827.doc

Federal Communications Commission. (1999b). *Report and Order: Review of the Commission's Regulations Governing Television Broadcasting,* MM Docket No. 91-221. Retrieved from http://www.fcc.gov/mb/policy/own.html

Federal Communications Commission. (2000a). *Biennial Regulatory Review Staff Report.* Retrieved from http://www.fcc.gov/Reports/biennial2000report.pdf

Federal Communications Commission. (2000b). *Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* MM Docket No. 98-35. Retrieved from http://www.fcc.gov/Bureaus/Mass_Media/Orders/2000/fcc00191.pdf

Federal Communications Commission. (2000c*). FCC Chairman responds to House vote to cut the number of community radio stations by 80%* [Press release]. Retrieved from http://www.fcc.gov/Speeches/Kennard/Statements/2000/stwek033.html

Federal Communications Commission. (2000d). *In the matter of the 2000 Biennial Regulatory Review Report, CC Docket No. 00-175*. Retrieved from http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-00-456A1.pdf

Federal Communications Commission. (2000e*). Low power FM radio service: Allegations and facts* [Press release]. Retrieved from http://www.fcc.gov/Bureaus/Mass_Media/Factsheets/lpfmfact032900.html

Federal Communications Commission. (2000f). *LPFM reconsideration order*. Retrieved from http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/2000/nrmm0040.html

Federal Communications Commission. (2000g). *Low Power FM filing window*. Retrieved from http://www.fcc.gov/Bureaus/Mass_Media/Public_Notices/FM_Windows/da00167.html

Federal Communications Commission. (2000h). *Notice of acceptance of low power broadcast applications and notification of petitions to deny deadline*. Retrieved from http://www.fcc.gov/Bureaus/Mass_Media/Public_Notices/FM_Windows/pnmm0084.html

Federal Communications Commission. (2000i). *Report and Order: In the Matter of Low Power Radio Servic*e. Report and Order, MM Docket No. 99-25, Retrieved from http://fjallfoss.fcc.gov/ecfs/comment/view?id=5006113241

Federal Communications Commission. (2001a). *FCC Chairman Michael Powell announces creation of media ownership working group* [Press release]. Retrieved from http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/2001/nrmc0124.html

Federal Communications Commission. (2001b). *In the Matter of the Applications of (Assignors) and Fox Television Stations, Inc. : Memorandum Opinion, No. 01-20*9. Retrieved from http://www.fcc.gov/Bureaus/Mass_Media/Orders/2001/fcc01209.pdf

Federal Communications Commission. (2001c). *FCC approves Fox/Chris-Craft merger with conditions* [Press release]. Retrieved from http://www.fcc.gov/Bureaus/Mass_Media/Orders/2001/fcc01209.pdf

Federal Communications Commission. (2001d). *Order and Notice of proposed rulemaking: In the matter of Cross-ownership of broadcast stations and newspapers and newspaper/radio cross-ownership waiver policy: MM Docket No. 01-235 and MM Docket No. 96-197*. Retrieved from http://www.fcc.gov/Bureaus/Mass_Media/Orders/2001/fcc01262.pdf

Federal Communications Commission. (2001e). *Office of Plans and Policy announces roundtable discussion of media ownership*. Retrieved from http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/2001/nrmc0124.html

Federal Communications Commission. (2001f). *Panelist biographies*. Retrieved from http://www.fcc.gov/ownership/biographies.html

Federal Communications Commission. (2001g). *Review of the radio industry 2000*. Retrieved from http://www.fcc.gov/mb/policy/docs/radio00.pdf

Federal Communications Commission. (2001h). *Review of the Radio Industry 2001*. Retrieved from http://www.fcc.gov/mb/policy/docs/radio01.pdf

Federal Communications Commission. (2001i). *Notice of proposed rulemaking and further notice of proposed rulemaking: In the matter of rules concerning multiple ownership of radio broadcast stations in local markets and definition of radio markets, MM Docket Nos. FCC 01-317, 01*. Retrieved from http://www.fcc.gov/Bureaus/Mass_Media/Notices/2001/fcc01329.pdf

Federal Communications Commission. (2001j). *Roundtable discussion on media ownership* [Podcast]. Retrieved from http://www.fcc.gov/realaudio/tr102901.pdf

Federal Communications Commission. (2002a). *Commissioner Michael J. Copps welcomes first hearing on media concentration* [Press release]. Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-229233A1.pdf

Federal Communications Commission. (2002b). *FCC Commissioner Michael J. Copps calls for national discussion of ethics in government and consolidation in media; Seeks further action on the public interest obligations of digital television broadcasters* [Press release]. Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226583A1.pdf

Federal Communications Commission. (2002c). *FCC's Media Bureau adopts procedures for public access to data underlying media ownership studies and extends comment deadline for 2002 Biennial Regulatory Review of media ownership rules* [Press release]. Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-02-2980A1.pdf.

Federal Communications Commission. (2002d*). FCC releases twelve studies on current media marketplace: Research represents critical first step in FCC's fact-finding mission* (2002) [Press release]. Retrieved from http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A1.pdf

Federal Communications Commission. (2002e). *Federal Communications Commission initiates third biennial review of broadcast ownership rules: Cites goals of updating rules to reflect modern marketplace* [Press release]. Retrieved from http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-226188A1.pdf

Federal Communications Commission. (2002f). Notice of proposed rulemaking, in the matter of 2002 biennial regulatory review – review of the commission's broadcast ownership rules and other rules adopted pursuant to section 202 of the Telecommunications Act of 1996, cross-ownership of broadcast stations and newspapers, rules and policies concerning multiple ownership of radio broadcast stations in local markets, definition of radio markets, FCC 02-249 (MB Docket No. 02-277), Retrieved from http://www.sba.gov/advo/laws/comments/dfcc03_0408.pdf

Federal Communications Commission. (2002g). *Public notice: FCC seeks comment on ownership studies released by media ownership working group and establishes comment deadlines for 2002 Biennial Regulatory Review of Commission's Ownership Rules* [Press release]. Retrieved from http://www.fcc.gov/ownership/studies.html.

Federal Communications Commission. (2003a). *FCC chairman launches 'localism in broadcasting' initiative*. Retrieved from http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-238057A1.pdf

Federal Communications Commission. (2003b). *FCC Commissioners Adelstein and Copps call for public airing of media concentration proposals* [Press release]. Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-234376A1.pdf

Federal Communications Commission. (2003c). *FCC Commissioners announce public hearing on media concentration: Field hearing set for Friday, March 7 in Seattle, WA. [Press release]*. Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-231698A1.pdf

Federal Communications Commission. (2003d). *FCC Commissioner Michael J. Copps announces two new media concentration hearings: Calls for protection for fearful witnesses* [Press release]. Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-230981A1.pdf

Federal Communications Commission. (2003e). *FCC Commissioner Michael J. Copps reacts to refusal to allow public airing of pending media concentration rules* [Press release]. Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-234590A1.pdf

Federal Communications Commission. (2003f). *Divided Commission votes to roll back media merger protections* [Press Release]. Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A6.pdf

Federal Communications Commission. (2003g). *Field Hearing: Broadcast Ownership en banc*). Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-233205A1.pdf

Federal Communications Commission. (2003h). *Panels and agenda set for public hearing in Richmond, VA on broadcast ownership rules* [Press Release]. Retrieved from http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-231387A2.pdf

Federal Communications Commission. (2003i). *Report and Order and Notice of Proposed Rulemaking* MB Docket 0227, MB Docket 01-235, MM Docket 01-317, MM Docket 00-244, MB Docket 03-130 Retrieved from http://www.mediaaccess.org/programs/diversity/MOR&O.pdf

Federal Communications Commission. (2003j). *Statement of Michael J. Copps, Commissioner Federal Communications Commission before the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce*. Retrieved from http://hraunfoss.fcc.go v /edocs_public/attachmatch/DOC-231559A1.pdf

Federal Communications Commission (2004). *Report to the Congress on the low power FM interference testing program*, Public Law No. 106-553.

Federal Communications Commission (2009). *Media bureau announces workshops to begin the 2010 quadrennial review of the FCC's media ownership*). Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-2139A1.pdf

Federal Communications Commission (2010). *FCC sends national broadband plan to Congress: Plan details actions for connecting consumers, economy with 21st century networks*. Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296880A1.pdf

Federal Communications Commission to hold public hearing on media concentration March 31 at Duke University (2003k). *Ascribe Newswire*. Retrieved from LexisNexis.

Federal court preserves stay of rules, calls FCC deregulation tendencies irrational and Inconsistent. (2004). *Prometheus Radio Group*. Retrieved from http:// www.prometheusradio.org

Fight looms at FCC: Adelstein warns consumer backlash to come. (2003, May 21). *Daily Variety*. Retrieved from LexisNexis.

Fish, S. (1980). *Is there a text in this class? The authority of interpretive communities*, Cambridge, MA: Harvard University Press.

Fisher, M. (2003, February 28). FCC tests reception for lifting owner limits: Roadshow gets lots of corporate static. *Washington Post*, p. C1.

Fowler, M., & Brenner, D. (1982). A marketplace approach to broadcast regulation. *Texas Law Review, 60*, 207-257.

Fox Television Stations, Inc. v. FCC, 280 F.3d 1027 (D.C. Cir. 2002).

Fratkin, B. C. (2002). *The National Citizens Committee for Broadcasting: A forgotten chapter of the media reform movement of the 1960s and 1970s.* University of Utah, Salt Lake City.

Free Press. (n.d.). *About us*. Retrieved from http://www.freepress.net/about_us

Friendly, F. (1967). *Due to circumstances beyond our control....* New York: Times Books.

Furchtgott-Ross, H. (2000). *Dissenting Statement of Harold Furchtgott-Ross: In the Matter of 1998 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to §202 of the Telecommunications Act of 1996*, FCC 00-191 C.F.R. Retrieved from http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-00-191A1.pdf

Gatlin, G. (2003, January 17). FCC gets opinions, few facts on owner rules. *Boston Herald*, p. 27.

Geewax, M. (2003, June 19). Senate panel votes to reverse FCC rules on media ownership. *Cox News Service*. Retrieved from LexisNexis.

Genachowski, J. (2010, May 6). *The third way: A narrowly tailored broadband framework*. Retrieved from http://www.broadband.gov/the-third-way-narrowly-tailored-broadband-framework-chairman-julius-genachowski.html

General Fairness Doctrine Obligations of Broadcast Licensees. Federal Register 50 35,418, 35,453 (1985).

General Order 40, 2 FRC Ann. Rep 166 (1928).

Genesee Radio Corporation v. FCC 5, 183 (1938).

Gentile, G. (2003, May 30). Protesters challenge FCC plan: Regulators expected to loosen media ownership rules. *Advocate* p. C3.

George, L. M., & Waldfogel, J. (2003, August). Who affects whom in daily newspaper markets? *Journal of Political Economy, 111*(4), 765-784.

Gomery, D. (2001, October 29). Ownership policies, diversity, and localism. *Roundtable on FCC ownership policies*. Retrieved from http://www.fcc.gov/ ownership/roundtable_docs/gomery-stmt.pdf

Gomery, D. (n. d.). Douglas Gomery Curriculum Vitae. Retrieved from http:// www.journalism.umd.edu/faculty/dgomery/cv.html

Great Lakes Broadcasting Co. v. FRC 37 F.2d 993 (1930).

Groups urge veto of telco bill (1995, November 4). *Editor & Publisher*, 128(44), p. 30.

Grundfest, J. A. (1976). *Citizen participation in broadcast licensing before the FCC.* Santa Monica: Rand Corporation.

Guild President Victoria Riskin speaks at FCC en banc hearing (2003, February 28). *Writers Guild of America*. Retrieved from http://www.wga.org/ subpage_newsevents.aspx?id=370

Gurwitt, R. (2004, March /April). Broadcast buccaneer. *Mother Jones, 29*(2), 24.

Hakanen, E. A., & Bishop, R. (2002). In the public interest? The state of local television programming fifteen years after deregulation. *Journal of Communication Inquiry; 26*(3), 261-277.

Hall, S. (1993). Encoding, decoding. In S. During (Ed.), *The cultural studies reader*, pp. 507-531. London: Routledge.

Halonen, D. (2002, December 9). FCC to hold media ownership hearing. *Electronic Media*, *21*, 3.

Halonen, D. (2003a, February 3). Senators prod FCC on ownership issue. *Electronic Media, 22*, 21.

Halonen, D. (2003b, March 3). FCC 'diversity index.' *Electronic Media, 22,* 6-8.

Halonen, D. (2003c, June 9). Landmark FCC vote comes under fire. *Television Week, 13,* 8-10.

Hatfield, D. (2000, March 24). *Statement of Dale Hatfield, Chief, Office of Engineering and Technology, Concerning low power FM engineering issues*. [Press release] Retrieved from http://www.fcc.gov/Bureaus/Engineering_Technology/ News_Releases/2000/nret0005.html

Hawley, E. W. (1974, June). Herbert Hoover, the Commerce Secretariat, and the vision of an associative State, 1921-1928. *Journal of American History, 61*, 116-140.

Hearn, T. (2000, June 5). FCC to maintain cable and TV ownership ban. *Multichannel News*, *21*(23), 1-2.

Hearn, T. (2001, October 22). Copps defend FCC public interest test. *Multichannel News*, *22*(43), 20.

Hearn, T. (2002, June 24). Martin-Powel chronicles: Dissention in FCC ranks. *Multichannel News*, *23*(25), 1-3.

Hearn, T. (2003a, April 21). New divider: 'Diversity index", *24,* 2-4.

Hearn, T. (2003b, September 8). Powell's rules of order get whiplashed. *Multichannel News, 24,* 1, 46.

Hearn, T. (2003c, September 22). Court says keep media case in Philly. *Multichannel News, 24,* 30-31.

Here, we would suggest, is a program for the FCC (1962, February 25). *Consumer Reports, 2,* 93-95.

Hickey, N. (2003a, March/April). Power shift: As the FCC prepares to alter the media map, battle lines are drawn. *Columbia Journalism Review*, 26-28.

Hickey, N. (2003b, July/August). Ready, set, consolidate. *Columbia Journalism Review, 37,* 30-33.

Ho, D. (2003a, April 17). FCC Head's adamant on news rule outlet. *South Florida Sun – Sentinel,* p. 3D.

Ho, D. (2003b, May 9). FCC Democrats frustrated on media review. *Associated Press.* Retrieved from LexisNexis.

Ho, D. (2003c, June 4). Senate questions FCC Commissioners on media ownership changes. *Associated Press*. Retrieved from LexisNexis.

Holland, B. (2003, March 15). FCC plan concerns media watchers. *Billboard, 115*(9), 7.

Holman, J. M., & McGregor M.A. (2001). Thank you for taking the time to read this: Public participation via new communication technologies at the FCC. *Journalism and Communication Monographs, 2*(4, Winter), 159-202.

Holson, L. M. (2002, June 21). Common foe for musicians and labels. *New York Times,* p. A1.

Horowitz, R. B. (1989). *The irony of regulatory reform*. New York: Oxford University Press.

Hoynes, W. (1994). *Public television for sale: Media, the market, and the public sphere*. Boulder, CO: Westview Press.

Hundt, R. (1994). *Speech before the 1994 convention of American women in radio and television.* Retrieved from http://www.fcc.gov/Speeches/Hundt/spreh415.txt

Hundt, R. (1995). Reading the First Amendment in favor of children: Implementing the Children's Television Act of 1990. *Speech to Brooklyn Law School*. Retrieved from http://www.fcc.gov/Speeches/Hundt/spreh547.txt

Hundt, R. (1997a). *Speech before the Federal Bar Association*. Retrieved from http://www.fcc.gov/Speeches/Hundt/spreh721.html

Hundt, R. (1997b). Thinking about why some communications mergers are unthinkable. *Brookings Institution Speech*. Retrieved from http://www.fcc.gov/Speeches/Hundt/spreh735.html

Huntemann, N. B. (2004, April). *The diversity dilemma: The fallacies of format differentiation as a measure of cultural value*. Paper presented at the annual convention of the Broadcast Educators Association, Las Vegas, NV.

In his own words: Michael Powell's changing FCC (2002, June 9). *Los Angeles Times,* p. C4.

Interstate Commerce Act. Public Law 49-41(1887).

Iosifides, P. (1999, Spring). Diversity versus concentration in the deregulated mass media domain. *Journalism & Mass Communication Quarterly* (99)76, 152-163.

James, F. (2003, February 27). Major decisions approach for Federal Communications Commission. *Chicago Tribune*, p. 1.

Jessel, H. A. (1998, April 6). Hall monitors. *Broadcasting & Cable, 128*(14), 82.

Jessell, H. A. (2003, January 20). Voices and choices. *Broadcasting & Cable, 133,* 71.

Johnson, G. (2003, March 8). Public hearing addresses media ownership issues.

Associated Press State and Local Wire. Retrieved from LexisNexis.

Johnson, G. (2003, June 3). Democrats: Decision hurts media diversity. *Boston Globe*, p. D4.

Johnson, N. (2003, May). Forty years of wandering in the wasteland. *Federal Communications Law Journal, 55* (3), 521-534.

Johnson, P. (1998). The United States. In D. Goldberg, T. Prosser & S. Verhulst (Eds.), *Regulating the changing media: A comparative study*. New York: Oxford University Press.

Jones, A. (2002, February). Website review-FAIR.org. *Journalism Studies, 3*(1), 137-138.

Jonsson, P. (2003, February 10). With Ted Turner's descent, end of an era? *Christian Science Monitor,* p. 3.

Kahn, F. J. (Ed.). (1984). *Documents of American Broadcasting* (4th ed.). Englewood Cliffs, NJ: Prentice-Hall.

Kahn, F. J. (Ed.). (1968). *Documents of American Broadcasting.* New York: Meredith Corporation.

Keller, M. (2004). Damn the torpedoes! Full speed ahead: The FCC’s decision to deregulate media ownership and the threat to viewpoint diversity. *Journal of Law and Policy, 12*, 891-943.

Kelliher, L. (2003, September/October). Low power, high intensity. *Columbia Journalism Review*, *42*(3*)*, 31-33.

Kennard, W. E. (1998). *Remarks by William E. Kennard Chairman Federal Communications Commission to NAB Radio convention*, Seattle, Washington. Retrieved from http://www.fcc.gov/Speeches/Kennard/spwek832.html

Kennard, W. E. (1999a). *The unregulation of the internet: Laying a competitive course for the future.* Speech presented at the Federal Communications Bar Northern California Chapter, San Francisco.

Kennard, W. E. (1999b). *Oral testimony of William E Kennard*. Retrieved from http://www.fcc.gov/Speeches/Kennard/Statements/stwk933a.html

Kennard, W. K. (2000). *Statement of William E. Kennard: In the Matter of 1998 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to §202 of the Telecommunications Act of 1996*. Retrieved from http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-00-191A1.pdf

Kerschbaumer, K. (2001). Bigger than ever: Rankings show that 25 groups control 24% of radio stations. *Broadcasting & Cable*. Retrieved from http://www.broadcastingcable.com/article/94566-Bigger_than_ever.php

Kirkland, J. & Struck, M. (2003, June 4). Snowe looks for answers as FCC parades Commissioners before senate panel: *States News Service*. Retrieved from LexisNexis.

Kirkpatrick, D. D. (2003, May 29). Media deregulation foes make Murdoch their lightning rod. *New York Times,* p. C6.

Klinenberg, E. (2007). *Fighting for air: The battle to control America's media*. New York: Metropolitan Books.

Knoll, A. (1996, Summer). Any which way but loose: Nations regulate the Internet. *Tulane Journal of International and Competitive Law, 4*, 275-302.

Konstantin, R. (1998, January/February). In the shadow of giants. *Columbia Journalism Review, 36*(5), 13.

Korn, G. E. (1991). *Everett C. Parker and the citizen media reform movement: A phenomenological life history*. Unpublished Doctoral dissertation, University of Illinois at Carbondale.

Krasnow, E. G., Longley, L. D., & Terry, H. A. (1982) *The politics of broadcast regulation* (3rd ed.). New York: St. Martin's Press.

Krattenmaker biography (n.d.). Retrieved from http://www.wilsonsonsini.com/WSGR/DBIndex.aspx?SectionName=attorneys/BIOS/9867.htm

Labaton, S. (2000, March 27). F.C.C. heads for showdown with Congress over radio plan. *New York Times*. p. C1.

Labaton, S. (2001, February 6). New FCC chief would curb agency reach. *New York Times*. Retrieved from http://www.nytimes.com/2001/02/07/business/new-fcc-chief-would curbagencyreach.html?scp=1&sq=Labaton%202001%20FCC&st=cse

Labaton, S. (2002a, February 4). Okay to grow. *New York Times,* p. C2.

Labaton, S. (2002b, February 25). Impatient court presses the F.C.C. to deregulate. *New York Times,* p. C2.

Labaton, S. (2002c, May 12). FCC chief nears goal on media rules: But Powell is forced to alter ownership plan to gain majority. *International Herald Tribune,* p. 11.

Labaton, S. (2002d, September 30). A lone voice for regulation at the F.C.C. *New York Times,* p. C1.

Labaton, S. (2003a, June 2). FCC votes to relax rules limiting media ownership. *New York Times,* p. A1.

Labaton, S. (2003b, June 3). Regulators ease rules governing media ownership. *New York Times,* p. A1.

Labaton, S. (2003c, June 20). Senate begins process to reverse new F.C.C. rules on media. *New York Times*. Retrieved from http://www.nytimes.com/2003/06/20/business/media/20RULE.html?scp=6&sq=FCC%20Labaton%202003&st=cse.

Labaton, S. (2003d, June 23). Senate votes to restore media limits. *New York Times,* p. 1.

Labaton, S. (2003e, September 22). FCC Chief talks of frustration and surprise. *New York Times*, C1.

Labaton, S. (2004, February 12). Court is urged to change media ownership rules. *New York Times,* p. C14.

Labaton, S. (2005, January 24). FCC faces a new set of challenges after Powell, *New York Times*, C1, C8.

Lawmakers decry FCC plans to issue ownership rules without review (2003, April 10). *CongressDaily,* 11-13.

Layton, C. (2004, December/January). News blackout. *American Journalism Review*. Retrieved from http://www.ajr.org/Article.asp?id=3500

Layton, C., & Cirillo, M. (2004, December/January). Tracking the coverage. *American Journalism Review, 25*(8), 20-31.

Lazaroff, L. (2003, October 16). Radio activists in Philadelphia take on FCC, media over ownership rules. *Chicago Tribune,* p. 1.

Ledbetter, J. (1997a). Media anti-trust. *The Village Voice, 42*(43), 28.

Ledbetter, J. (1997b). *Made possible by…the death of public broadcasting in the United States*. New York: Verso.

Lee, J. (2003a, January 31). Radio giant defends its size at Senate panel hearing. *New York Times,* p. 8.

Lee, J. (2003b, March 31). On Minot, N.D., radio, a single corporate voice. *New York Times,* p. C7.

Legislative history of P.L. No. 104-104. 141 Cong. Rec. 104th Cong. S. 7881,1 (1995)

Lemann, N. (2002, October 7). The Chairman. *New Yorker*, *87* (30) pp. 48-56.

Levi, L. (2000). Viacom-CBS merger: Reflections on the FCC's recent approach to structural regulation of the electronic mass media. *Federal Communications Law Journal, 52*, 581.

Levy, J., Ford-Livene, M. & Levine, A. (2002). *Broadcast television: Survivor in a sea of competition: OPP working paper series, media ownership working group study #12*. Retrieved from http://www.fcc.gov/ownership/ materials/already-released/survivor090002.pdf.

Lewis, H. (2003, April 1). FCC gets an earful at hearing: Most oppose more deregulation of media ownership. *The Herald Sun,* p. C1.

Lieberman, D. (2003, June 9). Joe, Jane Public left out of media debate. *USA Today,* p. B9.

Lin, S. F., & McDonald, D. G., (2004). The effect of new networks on U.S. television diversity. *Journal of Media Economics, 17*(2), 105-122.

Linder, L. R. (1999). *Public access television: America's electronic soapbox*. Westport, CT: Praeger Publishers.

Linder, C. (2003, May 27). Odd bedfellows seek halt to FCC's media deregulation. *States News Service*. Retrieved from LexisNexis.

Lohr, S. (1996, April 21). Wired life: The great unplugged masses confront the future. *New York Times*, p. 1D.

Lotozo, E. (n.d.). Activists' mission: Bringing radio power to the people. *Philadelphia Inquirer*, Retrieved from Newspaper Source database, EBSCO.

Love, J. (1994). Telecommunications policy roundtable list. *Distributed to TAP-INFO, a free Internet Distribution List*. Retrieved from http://www.interesting-people.org/archives/interesting-people/199310/mg00096.html

Lustig, R. J. (1982). *Corporate liberalism: The origins of modern American political theory, 1890-1920*. Berkeley: University of California Press.

Mann-Elkins Act. 61st Congress, Ch. 309, 36 Stat. 539 (1910)

Markels, A. (2000, June). Radio active. *Wired, 8,* 320-327.

Martin, G. (2003, January 14). Clear Channel's chief takes turn in hot seat. *San Antonio Express*. Retrieved from Newspaper Source Database.

Martin, K. (2002). *Separate statement of Kevin J. Martin approving in part, concurring in part. Re: 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*. Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226188A3.pdf

Martin, K. J. (2003a, January 16). *Opening statement of Kevin J. Martin Commissioner Federal Communications Commission.* Paper presented at the Media Ownership Forum, Columbia University.

Martin, K. J. (2003b, June 2). *Statement of Commissioner Kevin J. Martin on Biennial Review of Broadcast Ownership Rules*. Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A7.pdf

Martin, K. J . (2003c, June 4). *Written statement of Kevin J. Martin before the Committee on Commerce, Science and Transportation, United States Senate FCC Oversight Hearing*. Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235127A4.pdf

Martinez, B. (1997, September 23). Consumer groups to pressure FCC on cable-TV rates. *Wall Street Journal*, B8.

Mayer, R.N. (1989). *The consumer movement: Guardians of the marketplace*. Boston: Twayne Publishers.

McChesney, R. W. (2006, January/February). A Cornerstone of the Media Reform Movement FAIR at 20. *Extra!* Retrieved from http://www.fair.org/index.php?page=281

McChesney, R. W. (1993). *Telecommunications, mass media, and democracy: The battle for control of U.S. broadcasting 1928-1935*. New York: Oxford University Press.

McChesney, R. W. (1999). *Rich media, poor democracy: Communication politics in dubious times*. Urbana: University of Illinois Press.

McChesney, R. W. (2004a). Media policy goes to Main Street: The uprising of 2003. *Communication Review, 7*(3), 223-258.

McChesney, R. W. (2004b). *The problem of the media: U.S. communication politics in the 21st century*. New York: Monthly Review Press.

McConnell, B. (2001a, June 4). Two take seats. *Broadcasting & Cable*, *131*(24), 47-49.

McConnell, B. (2001b, October 22). Copps' lone voice. *Broadcasting & Cable, 131*(44), 30-32.

McConnell, B. (2002a, November 25). Media face grilling from Copps. *Broadcasting & Cable, 132,* 10-12.

McConnell, B. (2002b, December 9). Powell grants dereg hearing in Richmond *Broadcasting & Cable, 132,* 8.

McConnell, B. (2003a, March3). Latest prime suspect in FCC coup: Powell. *Broadcasting & Cable, 133*(9), 1.

McConnell, B. (2003b, June 9). Congress won't undo FCC rules, but courts may. *Broadcasting & Cable, 133,* 22-24.

McConnell, B. (2004a, February 16). Quizzed on ownership, and the tone is hostile, *Broadcasting & Cable, 134,* 12.

McConnell, B. (2004b, November 1). The Common touch. *Broadcasting & Cable, 134*(44), 26.

McConnell, B. (2010, March 24). Court clears way for TV/newspaper deals, *Daily Deal*. Retrieved from Lexis/Nexis.

McConnell, B., & Albiniak, P. (1998, December 12). Bigwigs weigh in on ownership. *Broadcasting and Cable, 128,* 23.

McConnell, C. (1996, Feb 12) Ownership spotlight moves to FCC. *Broadcasting & Cable, 126*(7), 16.

McConnell, C. (1998a, March 9). FCC considers low-power radio. *Broadcasting & Cable, 128*(10), 19.

McConnell, C. (1998b, May 4). Low-power radio brings high-intensity response. *Broadcasting & Cable, 128,* 22-24.

McCraw, T. K. (1980). Regulatory Agencies. In G. Porter (Ed.), *Encyclopedia of American Economic History (11).* New York: Scribners. pp. 778-807.

McGregor, M. A. (2006). When the 'public interest' is not what interests the public. *Communication Law and Policy, 11*(2), 207-224.

Media Access Project (n.d.). *About Media Access Project*. Retrieved from http:// www.mediaaccess.org/about/

Media Access Project (2003, September 4). *A message from the staff at Media Access Project on yesterday's victory in court* [Press release]. Retrieved from http://www.mediaaccess.org/MAPVictoryStatement.pdf

Media Access Project's report on oral argument in media ownership Court challenge in Prometheus Radio Project v. FCC (2004, February 11). [Press release] Washington, DC: Media Access Project.

Media-rule thrill ride still rolling (2003, June 14). *Billboard, 115,* 1-3.

Media Concentration: Hearing before Senate Committee on Commerce, Science, and Transportation, Senate, 107th Cong. 2nd 1(2001).

Media Ownership: Hearing before Senate Committee on Commerce, Science, and Transportation, Senate, 108th Cong.1 (2003).

Meiklejohn, A. (1948) *Free speech and its relation to self-government*. New York: Harper & Brothers.

Menendez, B. (2003, June 2). Menendez: FCC decision undermines nation's ideals [Press release]. Retrieved from Congressional Press Releases: LexisNexis.

A message from the staff at Media Access Project on yesterday's victory in court (2003). [Press release]. Retrieved from http://www.mediaaccess.org/press-room/a-message-from-the-staff-of-media-access-project-on-yesterdays-victory-in-court

Meyerson, M. I. (1997, February). Ideas of the marketplace: A guide to the 1996 Telecommunications Act. *Federal Communications Law Journal*, (*49*)2, 251-288.

Milam, L. W. (1965). *Sex and broadcasting*. Los Gatos: Dildo Press.

Miller, V. B., Ensley, C.H., Young, T.B. (2003, January). *Television industry summit 2002: Leveling the playing field, the case for deregulation.* Bear Sterns.

Minnow, N. W. (1965). *Equal time: The private broadcaster and the public interest*. New York: Atheneum.

Monsma, D. (2006). The academic equivalence of science and law: Normative legal scholarship in the quantitative domain of social science. *T. M. Cooley L. Review, 23*, 157-203.

MoveOn. (n.d.). About MoveOn family of organizations. Retrieved from http://www.moveon.org/about.html

Moyers, B. (2002, April 26). NOW with Bill Moyers [Television Show]: PBS. Retrieved from http://www.pbs.org/now/thisweek/index_042602.html

Moyers, B. (2003, April 25a). NOW with Bill Moyers [Television Show]: PBS. Retrieved from http://www.pbs.org/now/thisweek/index_042503.html

Mulkern, A. C. (2003a, May 14). Senators blast plan to loosen media-ownership rules: Some say FCC proposal will limit access, choice. *Denver Post,* p. K1.

Mulkern, A. C. (2003b, January 15). Senators wary of changes in media ownership rules. *Denver Post,* p. C1.

Mundy, A. (1996) Telecom Act liberates, further regulates video. *MediaWeek, (9)*4. Retrieved from LexisNexis.

Mundy, A. (1998, February 9). The new trustbusters. *MediaWeek, 8*(6). 24-26.

Mundy, A. (2001, June 4). FCC noms hold the phone. *MediaWeek*, *11*(23). 12.

Mundy, A. (2003a, March/April). Q & A FCC Commissioner Michael Copps: We're heading into the unknown. *Columbia Journalism Review, 41*, 30-31.

Mundy, A. (2003b, September 22). Senate aims resolution at consolidation, strikes Powell. *Cable World, 15,* 25-26.

Munn v. Illinois, 94 U.S. 113 (1876).

Munroe, N. (2001, July 23). FCC. *National Journal, 33*(25), 2011-2003.

Murray, A. (2003, February 24). FCC `palace coup' creates more work for the lobbyists. *Wall Street Journal* (Eastern Edition), p. A 4. Retrieved from Wall Street Journal database. (Document ID: 293342901).

NAHJ and NABJ call on FCC to delay issuing new broadcast ownership rules. (2003, May 27). *PR Press Wire*. Retrieved from LexisNexis.

Napoli, P. M. (2001a). *Foundations of communications policy: Principles and process in the regulation of electronic media*. Cresskill, NJ: Hampton Press, Inc.

Napoli, P. M. (2001b). Diversity and localism: A policy analysis perspective. *Roundtable on FCC Ownership Policies*. Retrieved from http://www.fcc.gov/ownership/roundtable_docs/napoli-stmt.pdf

Napoli, P. M. (2004). Curriculum Vitae. Retrieved from http://www.bnet.fordham.edu/public/comm/pnapoli/home.htm

Napoli, P. M., & Seaton, M. (2007). Necessary knowledge for communications policy: Information asymmetries and commercial data access and usage in the policymaking process. *Federal Communications Law Journal, 59*, 295-326.

National Broadcasting Company Incorporated v. United States et al., 319 U.S.190 (1943).

National Citizens Committee for Broadcasting v. United States et al., 436 U.S. 775 (1978).

National Information Infrastructure Act of 1993: Report to accompany H.R. 1757. 103rd Congress 1st Session, H.R., Rep. No. 103-225 (1993).

National Television Station Ownership Rule, 47 C.F.R. § 73.2555(3).

Nielsen Media Research (2002). *Consumer survey on media usage: Media working group study #8*. Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A17.pdf.

Ness, S. (2000). *Statement of Susan Ness: In the matter of 1998 biennial regulatory review of the commission's broadcast ownership rules and other rules adopted pursuant to §202 of the Telecommunications Act of 1996*. Retrieved from http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-00-191A1.pdf

New coalition unveils public interest blueprint for America's 21st century telecommunications highway. (1993, October 26). Retrieved from http://www.cni.org/Hforums/roundtable/about.html

News media gets good grades for Iraq coverage (2003, February 25). Washington, DC: The Pew Research Center for the People & the Press.

No title: S. 7805, 107th Cong. 2 (2001).

Notice of proposed rulemaking, FCC 02-249, 47 C.F.R. (2002).

Office of Communication of the United Church of Christ v. FCC, 359 F. 2d 543 (1969).

Office of the Clerk of the United States Court of Appeals for the Third Circuit (2004). Retrieved from http://www.fcc.gov/ogc/briefs/03-3388_013004.pdf

Onward to Richmond (2002, December 8). *Broadcasting & Cable, 132*(50). p.40.

Orol, R., & Lauria, P. (2003, April 8). Diller decries media deregulation. *The Deal*. Retrieved from LexisNexis.

Ownership re faces murky outcome (2003, September 22). *Broadcasting & Cable, 133,* 3.

Pelofsky, J. (2003, April 11). Some Senators seek more hearings: FCC to vote in June on media*.* *South Florida Sun-Sentinel,* p. 2D.

Pelosi, N. (2003, June 2). *Pelosi: FCC decision jeopardizes goals of diversity, competition, and local control* [Press release]. Retrieved from Congressional Press Releases: LexisNexis.

Petros, I. (1999, Spring). Diversity versus concentration in the deregulated mass media domain. *Journalism & Mass Communication Quarterly, 76(*1), 152-163.

Phlips, L. (1995). *Competition policy: A game theory perspective*. Cambridge, MA: Cambridge University Press.

The politics of big media (2003,September 19). *Economist, (368*) 8341, 55-57.

Pollitt, K. (1997, November 11). Subject to debate. *Nation, 265,* 9.

Postman, N. (1999). *Building a bridge to the 18th century: How the past can improve our future.* New York: Alfred A. Knopf.

Powell, M. K. (1998, April 5). *The public interest standard: A new regulator's search for enlightenment.* Speech presented at the American Bar Association 17th Annual Legal Forum on Communications Law, Las Vegas. Retrieved from http://www.fcc.gov/Speeches/Powell/spmkp806.html

Powell, M. K. (2000) *Dissenting statement of Michael Powell: In the matter of 1998 Biennial Regulatory Review-Review of the Commission's Broadcast Ownership rules and other rules adopted pursuant to section 202 of the Telecommunications Act of 1996.* Retrieved from http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-256206A1.pdf

Powell, M. K. (2001a). *Statement of Chairman Michael K. Powell: Re: Disposition of applications for the transfer of control of certain radio licenses*. Retrieved from http://www.fcc.gov/Speeches/Powell/Statements/2001/stmkp109.html

Powell, M.K. (2001b). *Transcript of conversation between Michael K. Powell and Sam Donaldson.* Retrieved from http://www.fcc.gov/Speeches/Powell/2001/spmkp102.pdf

Powell, M. K. (2001c). *Transcript of remarks of Chairman Michael K. Powel before Cellular Telecommunications Internet Association.* Speech presented at the CTIA convention, Las Vegas. Retrieved from http://www.fcc.gov/Speeches/Powell/2001/spmkp101.html

Powell, M. K. (2002a). *Remarks of Michael K. Powell, Chairman, Federal Communications Commission: Dialogue with Sam Donaldson.* Interview presented at the National Association of Broadcasters, Orlando, Florida. Retrieved from http://www.fcc.gov/Speeches/Powell/2002/spmkp207.html

Powell, M. K. (2002b). *Remarks of Michael K. Powell.* Transcript of discussion at the Goldman Sachs Communicopia XI Conference, New York. Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226929A1.pdf

Powell, M. (2002c, May 8). *Remarks of Michael K. Powell: Dialogue with Brian Lamb.* Paper presented at the National Cable & Telecommunications Association (NCTA), New Orleans, LA.

Powell, M. K. (2003a). *Chairman Michael K. Powell responds to members regarding upcoming Biennial Review of media ownership* [Press release]. Retrieved from http://www.fcc.gov/commissioners/letters/media-ownership/

Powell, M. K. (2003b*). Oral statement of Michael K. Powell, Chairman Federal Communications Commission, on Broadcast Ownership Biennial Review before the Committee on Commerce, Science, and Transportation, United States Senate*. Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235110A1.pdf

Powell, M. K. (2003c). *Opening statement of Michael K. Powell, Chairman Federal Communications Commission*. Paper presented at the Media Ownership Forum. Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-230350A1.pdf

Powell, M. K. (2003d). *Press statement of Michael Powell: In the matter of the 2002 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996.* Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A3.pdf

Powell, M. K. (2003e). Should limits on broadcast ownership change? *USA Today*, p. A11.

Powell, M.K. (2005) *Statement of FCC Chairman Michael K. Powell on leaving the Commission* [Press release]. Retrieved from http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-256206A1.pdf

Preservation of Localism, Program Diversity, and Competition in Television Broadcast Services Act of 2003, H. R., 108th Cong. 1 (2003).

Price, M. E., & Duffy, J. F. (1997). Technological change and doctrinal persistence: Telecommunication reform in Congress and the Court. *Columbia Law Journal*, *97*(4), 976-1015.

Pritchard, D. (2002, September). *Viewpoint diversity in cross-owned newspapers and television stations: A study of news coverage in the 2000 Presidential Campaign: Media ownership working group study #2*. Retrieved from http://www.fcc.gov/ownership/studies.html

Prometheus Radio Project. (n. d.). *About us*. Retrieved from http://prometheusradio.org/about_us/

Prometheus Radio Project. (n. d.). *Your dial was made for revolution*. Retrieved from http://prometheusradio.org/content/view/20/154/

Prometheus Radio Project v. FCC 3rd Circuit No. 03-3388 (2004).

Public Broadcasting Act of 1967 47 U.S.C. §396 (1967).

Pulley, B. (2002, April 29). Commander of the airwaves. *Forbes, 169(11)*, 78-82.

Radio Act of 1927 69th Cong., 2d, Public Law No. 632 (1927).

Radio Broadcasting Preservation Act of 2000, H.R. 3439, 106th Cong, 2 Session (2000).

Radio Broadcasting Preservation Act of 2000. S. 2068, 106th Cong. 2d Session (2000).

Ranly, D. P. (1976). *The challengers: Social pressure on the press 1965-1975.* Unpublished Doctoral Dissertation, University of Missouri, Columbia.

Red Lion Broadcasting Co. v. FCC, 336 U.S. 367 (1969).

Reno v. American Civil Liberties Union 521 U.S. 844 (1997).

Report on Chain Broadcasting, 47 C.F.R.§3.631-638 (1941).

Report on the Fairness Doctrine, 102 F.C.C.2d 145 (1985).

Roberts, S., Frenette, J., & Stearns, D. (2002). *A comparison of media outlets and owners for ten selected markets, 1960, 1980,* 2000: Media ownership working group study #1. Retrieved from http://www.fcc.gov/ownership/materials/already-released/comparison090002.pdf

Rosenstiel, T., Chinni, D., & Avila, T. (2003, February 27). *New federal rules for media ownership: How much does the public know?* Washington, DC: Pew Research Center's Project for Excellence in Journalism. Retrieved from http://www.journalism.org/node/3047

Rowland, W. D. (1982). The illusion of fulfillment: The broadcast reform movement. *Journalism Monographs*, 79. Rules Governing Standard and High Frequency Standard Broadcast Stations, 47 C.F.R. § 73.3555 (d) (1940).

Rules Governing Standard and High Frequency Broadcast Stations, Multiple Ownership of Standard Broadcast Stations, 47 C.F.R. § 73.3555(a) (1943).

Russo, M. (2001, October 29). *FCC Chairman Michael Powell announces creation of Media Ownership Working Group* [News release]. Retrieved from http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/2001/nrmc0124.pdf

S. Rep. No. 104-230 (1996).

S. 2518, 106th Cong. 2d Session (2000).

Safire, W. (2002, May 22). The great media gulp. *New York Times,* p. A.33.

Safire, W. (2003a, January 20). On media giganticism. *New York Times*, p. A19.

Safire, W. (2002b, May 22). The great media gulp. *New York Times,* p. A33.

Safire, W. (2003c, June 16). Regulate the FCC. *New York Times,* p. A19.

Safire, W. (2003d, June 26). Big media's silence. *New York Times,* p. A33.

Safire, W. (2003e, July 24). Bush's four horsemen. *New York times*, p. A19.

Safire, W. (2003f, July 17). Localism's last stand. *New York Times,* p. A27.

Safire, W. (2003g, September 17). The Senate says no. *New York Times,* p. A27.

Sanders, E. (2002, October 2). Results of FCC's media studies are released; Regulations: The agency is expected to use the findings to provide justification for future rules on ownership. *Los Angeles Times,* p. C2.

Sanders, E., & Hofmeister, S. (2002, June 9). Bringing regulations up to speed: As the communications industry changes at a dizzying pace, Michael Powell of the Federal Communications Commission is facing criticism for his deliberate pace. *Los Angeles Times*. p. C1.

Sarno, E. F. (1969). The National Radio Conferences. *Journal of Broadcasting 13*(2), 189-202.

Saxe, F. (2001, June 9). Broadcasters may face more regulation due to recent Senate shake-up. *Billboard*, *113* (23), 82-84.

Schatz, J. (2003, November 1). Congress weighs pros, cons of 'Omnibus' approach. *Congressional Quarterly Weekly, 61*, 2688-2693.

Schiesel, S. (2002, April 3). FCC rules on ownership under review. *New York Times*. p. C1.

Schlesinger, A. M. (1951). *The rise of modern America: 1865-1951*. New York: The Macmillan Company.

Schwartzman, A. J., Leanza, C. A., Campbell, A.J., Bachtelll, J.A,.& Henein, K, (2004, January 26). Prometheus Radio Project, et al. v. FCC and United States No. 03-3388, *Rule 28(j), FRAP*. Retrieved from http://www.mediaaccess.org/programs/diversity/CitizenPet28JLetter.pdf

Schwartzman, A. J., & Feld, H, Desai, P. (2006). Section 202(h) of the Telecommunications Act of 1996: Beware of intended consequences. *Federal Communications Law Journal, 51*, 581.

Scott, A. (2003, March 8). Move to ease media-ownership rules given a cool reception in Seattle. *Seattle Times,* p. 1.

Senate Commerce hears debate on media ownership. (2004, Sept. 28). *FreePress.* Retrieved from http://www.freepress.net/washington/update.php?id=62]

Setzer, F. & Levy, J. (1991, June). *Broadcast television in a multichannel marketplace, OPP working paper series*: *Media ownership working group study #12.* Retrieved from http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp26.pdf

Shadid, A. (2001, March 8). Powell: Market should guide telecom changes FCC chief urges less reliance on law. *Boston Globe*, p. E3.

Shales, T. (2003, June 6). Senate panel cuts big media down to size. *Washington Post,* p. C1.

Shields, T. (2002a, July 29). The FCC's gatekeeper. *Mediaweek, 12*(28), 22-26.

Shields, T. (2002b, October 7). FCC: Just the facts. *Mediaweek, 12*(36), 6-8.

Shields, T. (2003a, March 17). Good Copps, Bad Copps. *Mediaweek, 13,* 28-31.

Shields, T. (2003b, March 3). Voices from the field. *Mediaweek, 13,* 6.

Shields, T. (2003c, June 9). FCC ownership vote comes under fire. *Adweek, 44,* 10.

Shields, T. & Bachman, K. (2003, May 19). Dereg gains momentum. *Mediaweek, 13,* 6-8.

Shriver, J. (2002, February 29). Court rejects FCC's limits on TV ownership, Media: An appeals panel says agency's cap on how many U.S. households a firm can reach is contrary to law.' More mergers may result. *Los Angeles Times,* p. A1.

Silk, A. J., Klein, L. R. & Berndt, E. R. (2002, June 4). Intermedia substitutability and market demand by national advertisers. *Review of Industrial Organization, 20,* 323-348.

Sillars, M. O. (1991). *Messages, meanings, and culture: Approaches to communication criticism*. New York: HarperCollins.

Sillars, M. O., & Gronbeck, B. E. (2001). *Communication criticism; Rhetoric, social codes, and cultural studies*. Prospect Heights: Waveland Press.

Sinclair Broadcasting Group v. FCC, 284 F.3d 148 (D.C. Cir. 2002)

Singleton, L. A. (2003, Fall). Silent voices: Analyzing the FCC "Media Voices" criteria. *Communication Law & Policy,* 8(4), 385-404.

Slocum, C. B. (2003,). *Joint comments of Writers Guild of America, West, Producers Guild of America, Shukovsky English Productions, Bungalow 78 Entertainment, Oh Shoot Productions, Gideon Productions and UBU Productions.* Retrieved from http://www.wga.org/uploadedFiles/news_and_events/press_release/fcc/WGAwEtAlComments.pdf

Smith, L. K. (2003, April). *In whose best interest? FCC deregulation and local news: How cross-ownership, national caps and duopolies are addressed in three commissioned studies.* Unpublished doctoral dissertation, University of Texas, Austin.

Smith, M. Y. (1982). The method of history. In G.H. Stemple & B.H. Westly (Eds.), *Research methods in mass communication* (pp 305-320). Englewood Cliffs, NJ: Prentice Hall, Inc.

Soley, L. (1999). *Free radio: Electronic civil disobedience*. Boulder, CO: Westview.

Spavins, T. C., Denison, L, Frenette, L., & Roberts, S. (2002, September). *The measurement of local television news and public affairs programs: Media ownership working group study #7*. Retrieved from http://www.fcc.gov/ ownership/materials/already-released/measurement090002.pdf.

Starr, J. (2000). *Air wars: The fight to reclaim public broadcasting*. Boston: MA. Beacon Press.

Stavitsky, A. G. (1995). Guys in suits with charts: Audience research in public radio. *Journal of Broadcasting and Electronic Media, 39*(2), 177-189.

Stavitsky, A. G. & Avery, R. K. (2003). U.S. public broadcasting and the business of public service. In G.F. Lowe & T. Hujanen (Eds.), (pp.137-146). *Broadcasting and convergence: New articulations of public service remit*. Goteburg, Sweden: Nordicom.

Stavitsky, A. G., & Avery, R. K., & Vanhala, H. (2001). From Class D to LPFM: The high-powered politics of low-power radio. *Journalism & Mass Communication Quarterly, 78*(2), 340-354.

Steiner, G.A. (1963). *The people look at television: A study of audience attitudes*. New York: Alfred A. Knopf.

Sterling, C. H. (1984). *Electronic media: A guide to trends in broadcasting and newer technologies 1920-1983.* New York: Praeger.

Sterling, C. H., & Kittross, J. M. (1990). *Stay tuned: A concise history of American broadcasting* (2nd ed.). Belmont: Wadsworth Publishing Company.

Stern, C. (2001, March 13). Blocked radio deals approved; Chairman of FCC uses administrative powers. *Washington Post,* p. E3.

Storer Broadcasting Co., 351 U.S. 192 (1956).

Streeter, T. (1987). The cable fable revisited: Discourse, policy, politics, and the making of cable television. *Critical Studies in Mass Communication 4*(2), 174-200.

Streeter, T. (1990). Beyond freedom of speech and public interest: The relevance of critical legal studies to communications policy. *Journal of Communication, 40(2*) 43-63.

Streeter, T. (1996). *Selling the air: A critique of the policy of commercial broadcasting in the United States*. Chicago: Chicago University Press.

Strong opposition to media cross-ownership emerges. (2003, July 13). Washington, DC: The Pew Research Center for the People & the Press. Retrieved from http://people-press.org/report/188/strong-opposition-to-media-cross-ownership-emerges

Student note: Paying attention to justice: The FCC and the failure to regulate. (2002, Fall). *Media Law & Policy*, 62-83.

Sunstein, C. R. (1995). *Democracy and the problem of free speech*. New York: The Free Press.

Syracuse Peace Council v. FCC, 867 F.2d 654, 656 (D.C. Cir. 1989).

Tedlow, R. S. (1985). The antitrust movement: Symbolic politics and industrial organization economics. In A. D. T. Chandler, & S. Richard (Eds.), *The coming of managerial capitalism: A casebook on the history of American economic institutions* (pp. 551-578). Homewood IL: Richard D. Irwin, Inc.

Telecommunications Act of 1996, Conference Report. *Congressional Record*, S 686 142(14).

Telecommunications Act of 1996. P. L. No. 104, 110 Stat. 56. (1996).

Telecommunications Competition and Deregulation Act of 1995. S. 652, 104th Congress (1995).

Telecommunications Competition and Deregulatory Act 141 Cong. Rec. S. 7881 (1995)

Time Warner Entm't. Co. v. FCC, 56 F.3d 151, 162 (D.C. Circuit 2001)

Trigoboff, D. (2003, June 9). Copps: Dereg foes will be back. *Broadcasting & Cable, 133*(23) 26.

Tristani, G. (2001a). *Dissenting statement of Commissioner Gloria Tristani Re: Transfer of control of broadcast licenses held by subsidiaries of Chris-Craft Industries, Inc., to Fox Television Stations, Inc*. Retrieved from http://www.fcc.gov/Speeches/Tristani/Statements/2001/stgt149.html

Tristani, G. (2001b). *Departure statement of Gloria Tristani*. Retrieved from http://www.fcc.gov/Speeches/Tristani/Statements/2001/stgt154.html

Tuckel, P., & O'Neill, H. (2002, September/October). The vanishing respondent in telephone surveys. *Journal of Advertising Research, 42*(5), 26-48.

Turner Broadcasting Company Inc., v. FCC 512 U.S 662 (1994).

Turner Broadcasting Systems Inc. v. FCC 520 U.S.180 (1997).

Turner, T. (2003). Monopoly or democracy? *Washington Post,* p. A23.

2 FRC Ann. Rep 166 (1928).

United Church of Christ. (n.d.). *About u*s. Retrieved from http://www.ucc.org/about-us/

United States v. Clear Channel Communications Civil Action No.: 1:00CV02063, (2001, September 6) pp.1-10.

United States v. Zenith Radio Corporation et al. 12 F. 2d 614 (1926).

Wabash, St. Louis and Pacific Railway Company v. Illinois, 118 U.S. 557(1886).

Waldfogel, J. (2001). Consolidation and localism. *Roundtable on FCC Ownership Policies*. Retrieved from http://www.fcc.gov/ownership/roundtable_docs/ waldfogel-stmt.pdf

Waldfogel, J. (2002). *Consumer substitution among media: Media ownership working group study #3.* Retrieved from http://www.fcc.gov/ownership/materials/already-released/consumer090002.pdf

Waldfogel, J. (n.d.). Curriculum Vita. Retrieved fromhttp://rider.wharton.upenn.edu/ ~waldfogj/cv.pdf

Wallace, N. (2004, March 4). Technology. *Chronicle of Philanthropy, 16*(10), 3.

Wertheimer, F. (1995, Spring). Common Cause and the new political era. *Common Cause Magazine*, 21(1), 30.

Wetlaufer, G. B. (1999). Systems of belief in modern American law: A view from century’s end. *American University Law Review, 49*(1), 1-79.

What you don’t know can hurt: Television’s vast wasteland. (1961, January). *Consumer Reports, 26,* 424-427.

What’s FAIR? (n. d.). *Fairness and accuracy in feporting.* Retrieved from http:// www.fair.org/index.php?page=100

Whitney, D. (2002, October 14). Most powerful women in television. *Electronic Media, 21,* 8-18.

Wiebe, R. H. (1967). *The search for order: 1877-1920*. New York: Hill and Wang.

Wieck, P. (1973, June 2). The John Gardner Brigade. *New Republic*, *168*(22), 21-23.

Wigfield, M. (2003, April 9). Deals & dealmakers: Index relaxing media ownership still engenders fear in industry. *Wall Street Journal,* p. C5.

Williams, G., Brown, K., & Alexander, P. (2002). *Radio market structure and music diversity*: Media ownership working group study #9. Retrieved from http://www.fcc.gov/ownership/materials/already-released/radiomarket090002.pdf.

Williams, G., & Roberts, S. (2002). *Radio industry review 2002: Trends in ownership, formats and finance; Media ownership working group study #11*. Retrieved from http://www.fcc.go/ownership/materials/already-released/radioreview090002.pdf

Williams, R. (1998). From Marxism and literature. In D. H. Richter (Ed.), *Critical tradition: Classic texts and contemporary trends*. Boston: St. Martin's Press.

Witherspoon, J., Kovitz, R., Avery, R. K., & Stavitsky, A. G. (2000). *A history of public broadcasting*. Washington, DC: Current Publishing.

Yang, C. (2003, June 16). Mad as hell at the FCC. *Business Week, 3837,* 37.

Yochi, D. (2003, September 5). No-frills fighter stuns the FCC, media goliaths. *Wall Street Journal,* p. B1.

Zelizer, B. (1993). Journalists as interpretive communities. *Critical Studies in Mass Communications 3*(10), 219-237.

Zinn, H. (1985). *A people's history of the United States: 1492-Present*. New York: HarperPerennial.